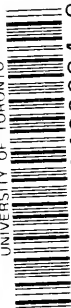


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A
REPORT
OF THE
JUDGMENT,

DELIVERED IN THE CONSISTORIAL COURT OF LONDON,

On the Sixteenth Day of July, 1811,

BY THE RIGHT HONOURABLE

SIR WILLIAM SCOTT,

CHANCELLOR OF THE DIOCESE,

IN THE CAUSE

OF

DALRYMPLE THE WIFE,

AGAINST

DALRYMPLE THE HUSBAND.

WITH

An Appendix,

CONTAINING THE DEPOSITIONS OF THE WITNESSES

THE LETTERS OF THE PARTIES,

AND

OTHER PAPERS EXHIBITED IN THE CAUSE.

BY

JOHN DODSON, LL. D.

ADVOCATE IN DOCTORS COMMONS.

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1811.



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W. Heseltine, Printer, Chequer Yard,
Dowgate Hill, London,

ADVERTISEMENT.

THE following Report, of a Case recently decided in the Consistorial Court of London, has been drawn up in compliance with the wishes of one of the Parties in the Cause, and is published under the hope that it may prove not unacceptable to the Profession and the Public.---The Judgment, as delivered by the very eminent person who presides in that Court, contains a clear and masterly

account of the nature and institution of Marriage, and of the various modes by which the relation of Man and Wife may be constituted. Those modes and regulations, as prescribed by the Law of Scotland, furnish the more immediate subject of discussion, but it was necessary to take a wider range in order to obtain a full and comprehensive view of the subject. From the Investigation it appears, according to the Judgment of that learned person, that the Law of Scotland, in relation to the Marriage Compact, rests upon the basis of the ancient Canon Law, and has not deviated from the rule of

that system on which it is founded, whereby a contract *per verba de præ-senti*, or a promise *de futuro cum copulâ*, is considered as sufficient to constitute a legally valid Marriage.--- To the People of Scotland this decision, it is presumed, will be found peculiarly interesting, being calculated to assist in the prevention of all future doubts upon a subject respecting which great difference of opinion has lately prevailed, and involving, as it does, the domestic security and happiness of many families. Nor can it be deemed wholly unimportant to the Inhabitants of this part of the United Kingdom:

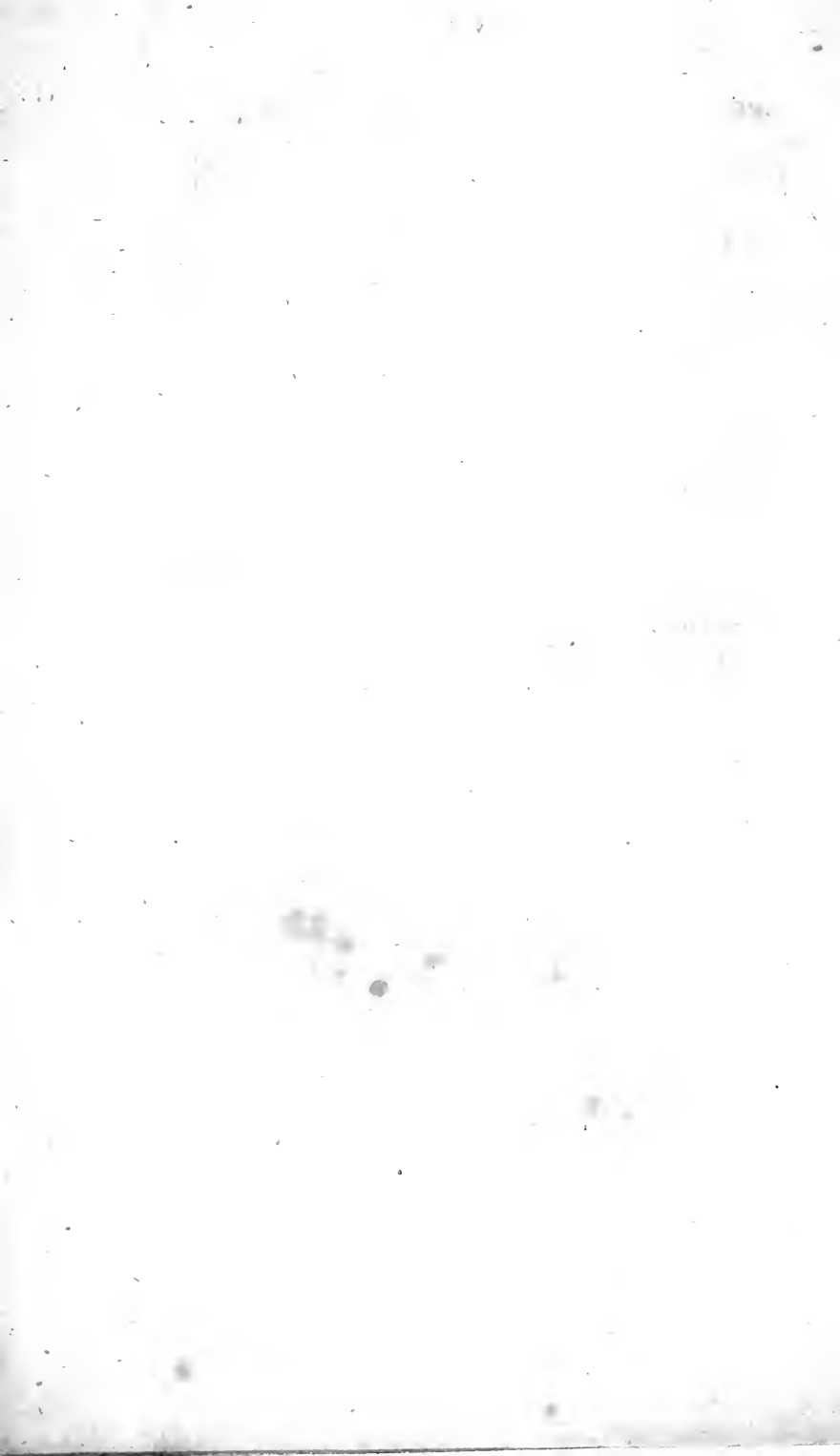
Although a very different line of policy relative to the law of Marriage has been *here* adopted, yet the question derives a degree of consequence from the intimate connection subsisting between the two countries, and the constant intercourse necessarily taking place between their respective inhabitants. It must be recollected likewise, that the legal Tribunals of England recognize the validity of every Marriage contracted in conformity to the Laws and Usages of the Country in which it had its Origin.---If the present Publication shall tend to diffuse any correct information upon a subject which ap-

pears so important, and at the same time to convey some idea of the character of the judicial Decision by which the Doctrine is established, the wishes of the Reporter will be satisfied, and his object completely attained.

J. D.

DOCTORS COMMONS,

August 24, 1811.



THE
JUDGMENT.

SIR WILLIAM SCOTT.

THE facts of this case, which I shall enter upon without preface, are these : Mr. John William Henry Dalrymple is the son of a Scotch noble family ; I find no direct evidence which fixes his birth in England, but he is proved to have been brought up from very early years in this country. At the age of nineteen, being a Cornet in his Majesty's Dragoon Guards, he went with his regiment to Scotland in the latter end of March, or beginning of April, 1804, and was quartered in and near Edinburgh during his residence in that country. Shortly after his arrival, he became acquainted with Miss Johanna Gordon, the daughter of a gentleman in a respectable condition of life. What her age was does not directly appear, she being described as of the age of twenty-one years *and upwards* : she was however young enough to excite a passion in

his breast, and it appears that she made him a return of her affections : he visited frequently at her father's house in Edinburgh, and at his seat in the country, at a place called Braid. A paper without date, marked No. 1, is produced by her: it contains a mutual *promise* of marriage, and is superscribed, " a sacreed promise." A second paper, No. 2, produced by her, dated May 28, 1804, contains a mutual *declaration* and *acknowledgment* of a marriage.---A third paper, No. 10, produced by her, dated July 11, 1804, contains a *renewed declaration* of marriage made by him, and accompanied by a promise of acknowledging her the moment he has it in his power, and an engagement on her part, that nothing but the greatest necessity shall compel her to publish this marriage. These two latter papers were inclosed in an envelope, inscribed " Sacreed " Promises and Engagements," and all the three papers are admitted or proved in the cause to be of the hand-writing of the parties, whose writing they purport to be. It appears that Mr. Dalrymple had strong reasons for supposing that his father and family would disapprove of this connection, and to a degree that might seriously affect his fortunes ; he, therefore, in his letters to Miss Gordon, repeatedly enjoined this obligation of the strictest secrecy, and she observed it even to the extent of making no communication of their mutual engagements to her father's family ; though the attachment and the intercourse

founded upon it did not pass unobserved by one of her sisters, and also by the servants, who suspected that there were secret ties, and that they were either already, or soon would be married.---He wrote many letters to her, which are exhibited in the cause, expressive of the warmest and most devoted passion, and of unalterable fidelity to his engagements, in almost all of them applying the terms of husband and wife to himself and her.---It appears that they were in the habit of having clandestine nocturnal interviews, both at Edinburgh and Braid, to which frequent allusions are made in these letters. One of the most remarkable of these nocturnal interviews passed on the 6th of July at Edinburgh, where she was left alone with two or three servants, having declined to accompany her father and family (much to her father's dissatisfaction) to his country-house at Braid. There is proof enough to establish the fact, in my opinion, that he remained with her the whole of that night. He continued to write letters of a passionate and even conjugal import, and to pay nocturnal and clandestine visits during the whole of his stay in Scotland, but there was no cohabitation of a more visible kind, nor any habit and repute, as far as appears, but what existed in the surmises of the servants and of the sister. His stay in that country was shortened by his father who came down, alarmed as it should seem by the report of what was going on, and removed him to England on or about

the 21st of July. The correspondence appears to have slackened (though the language continued equally ardent) if I judge only from the number exhibited of the letters written after his return, though it is possible, and indeed very probable, there may be many more which are not exhibited. No letters of Miss Gordon's, addressed to him, are produced; he has not produced them, and she has not called for their production. In England he continued till 1805, when he sailed for Malta: his last letter, written to her on the eve of his departure, reinforces his injunctions of secrecy, and conjures her to withhold all credit from reports that might reach her of any transfer of his affections to another: it likewise points out a channel for their future correspondence through the instrumentality of Sir Rupert George, the first Commissioner of the Board of Transports. He continued abroad till May 1808, with the exception of a month or two in the autumn of 1806, when he returned for a purpose unconnected with this history, unknown to his father, and, as it appears, to this lady. It is upon this occasion that the alteration of his affection first discloses itself in conversations with a Mr. Hawkins, a friend of his family, to whom he gives some account of the connection which he had formed with Miss Gordon in Scotland, complains of the consequences of it, in being tormented with letters from her, which he was resolved never to read in future; and having

reason to fear she would write others to his father, he requested Mr. Hawkins to use all means of intercepting any letters she might write either to the one or the other. Mr. Hawkins executed this commission by intercepting many letters so addressed; though, in consequence of her extreme importunity, he forwarded two or three, as he believes, of those addressed to Mr. Dalrymple; and he at length wrote to her himself, about the end of 1806, or beginning of 1807, and strongly urged her to desist from troubling General Dalrymple with letters. This led to a correspondence between her and Mr. Hawkins; and it was not till the death of Mr. Dalrymple's father (which happened in the spring of the year 1807) that she then asserted her marriage rights, and furnished him with copies of these important papers, which she denominates, according to the style of the law of Scotland, her *marriage lines*. She took no steps to enforce her rights by any process of law. Upon the unlooked-for return of Mr. Dalrymple, in the latter end of May, 1808, he immediately visited Mr. Hawkins, who communicated what had passed by letter between himself and Miss Gordon, and suffered him, though not without reluctance, to possess himself of two of her letters, which Mr. Dalrymple has exhibited. Mr. Hawkins however dismissed him with the most anxious advice to adhere to the connection he had formed, and by no means to attempt to in-

volve any other female in the misery that must attend any new matrimonial connection. Within a very few days afterwards, Mr. Dalrymple marries Miss Laura Manners, in the most formal and regular manner. Miss Gordon, who had before heard some reports of no very definite nature, instantly, upon hearing authentic news of this event, takes measures for enforcing her rights; and being informed that he is amenable only to this jurisdiction, she immediately applies for its aid to enforce the performance of what she considers as a *marriage contract*.

The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition, for which the Court has to acknowledge great obligations to the Gentlemen who have been examined in Scotland. It has also been argued with great industry and ability by the Counsel on both sides, and now stands for final judgment. Being entertained in an English Court, it must be adjudicated according to the principles of English law, applicable to such a case. But the only principle applicable to such a case by the law of England, is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland.

I am not aware that the case so brought here is exposed to any serious disadvantage, beyond that which it must unavoidably sustain in the inferior qualifications of the person who has to decide upon it, to the talents of the eminent men to whose judgment it would have been submitted in its more natural Forum. The law-learning of Scotland has been copiously transmitted; the facts of the case are examinable on principles common to the law of both countries, and indeed to all systems of law. It is described as an advantage lost, that Miss Manners, the lady of the second marriage, is not here made a party to the suit; she might have been so in point of form, if she had chosen to intervene; in substance she *is*, for her marriage is distinctly pleaded and proved, and is as much therefore under the eye, and under the attention, and under the protection of the Court, as if she were formally a party to the question respecting the validity of this marriage, which is in effect to decide upon the validity of her own; For I take it to be a position beyond the reach of all argument and contradiction, that if the Scotch marriage be legally good, the second or English marriage must be legally bad. Another advantage intimated to be lost is this, that the Native Forum would have compelled the production of her letters to him, for the purpose of seeing whether any thing in them favoured his interpretation of the transaction. Surely, according to any mode of proceed-

ing, there can be no need of a compulsory process to extract them from the person in whose possession they must be, if they exist at all. If they contain such matter as would favour such an interpretation, he must be eager to produce them, for they would constitute his defence; not being produced, the necessary conclusion is, either that they do not exist, or that they contain nothing which he could use with any advantage for such a purpose. The considerations that apply to the indiscretions of youth, to the habits of a military profession, and to the ignorance of the law of Scotland arising from a foreign birth and education, are common to both, and I might say, to all systems of law. They are circumstances not to be left entirely out of the consideration of the Court, in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established. The law, which in both countries allows the minor to marry, attributes to him, in a way which cannot be legally averred against upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion, *quoad hoc*, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession exonerate a man from the general obligations of law. And with respect to any ignorance arising from

foreign birth and education, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge and sense of the obligation which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of Scotland binds Mr. Dalrymple, though a minor, a soldier, and a foreigner, as effectively as it would do if he had been an adult living in a civil capacity, and with an established domicile in that country.

The marriage which is pleaded to be constituted by virtue of some or all of the facts of which I have just given the outline, and which I shall have occasion more particularly to advert to in the course of my judgment, has been in the argument described as a *clandestine* and *irregular* marriage. It is certainly a *private* transaction between the individuals, but it does not of course follow that it is to be considered as a *clandestine* transaction in any ignominious meaning of the word, for it may be that the law of the country in which the transaction took place, may contemplate private marriages with as much coun-

tenance and favour as it does the most public. It depends likewise entirely upon the law of the country, whether it is justly to be stiled an *irregular* marriage. In some countries one only form of contracting marriage is acknowledged, as in our own, with the exception of particular indulgences to persons of certain religious persuasions; saving those exceptions, all marriages not celebrated according to the prescribed form, are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries, all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries, a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law on account of the non-conformity to the order that is established. What is the law of Scotland upon this point?

Marriage being a contract, is of course *consensual* (as is much insisted on, I observe, by some of the learned advocates) for it is of the essence of all contracts to be constituted by the consent of parties. ^a *Consensus non concubitus facit matri-*

^a D. Lib. 50. Tit. 17. l. 30. de Reg. Juris.—D. Lib. 35. Tit. 1. l. 15.—Huber de Nuptiis, p. 23. Lib. 24. Tit. 2. de Divortiis.—Voet. Lib. 23. Tit. 2. § 2.—Vinnius Lib. 1. Tit. 9. § 1.—Cujac. in D. de Rit. Nup. V. 1. p. 800. in Cod. Lib. 5. Tit. 1. de spons. et Arrhis.—Taylor's Civil Law, p. 301. Puffendorf, B. 6. C. 1. S. 14.

monium, the maxim of the Roman civil law, is, in truth, the maxim of all law upon the subject; for the *concubitus* may take place for the mere gratification of present appetite, without a view to any thing further; but a marriage must be something more; it must be an agreement of the parties looking to the ^b*consortium vitæ*: an agreement indeed of parties capable of the *concubitus*, for though the *concubitus* itself will not constitute marriage yet it is so far one of the essential duties for which the parties stipulate, that the ^cincapacity of either party to satisfy that duty nullifies the contract.---Marriage, in its origin, is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind; It is the parent, not the child, of civil society.---In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries acting under a sense of the force of sacred obligations, it has

—Wood's Instit. Book 1. Chap. 1.—27. Qu. 2. C. 1. Matrimonium.—27. Qu. 2. C. 2. Sufficiat.—27. Qu. 2. C. 5. Cum initiatur.—27. Qu. 2. C. 6. Conjuges.—C. 25. Extra. de Spons. et Matrim.
—Huber. Eunom. Rom. ad Lib. 23. Pand. Vind. § 1.—Hoppii commen. ad Ins. Lib. 1. Tit. 10.—Wood's Instit. Book 1. Chap. 2. Ayl. Parerg. 362.

^b D. Lib. 23. Tit. 2. l. 1.—Instit. Lib. 1. Tit. 9. S. 1.

^c C. 2 et 3. Extra. de Spons. et Matrim.—Vinnius Lib. 1. Tit. 9. § 1.—Burn's Eccles. Law. V. 2. P. 500. Ayl. Par. 226.

had the sanctions of religion superadded; It then becomes a religious as well a natural and civil contract; for it is a great mistake to suppose that, because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals pledged to each other, is ratified and consecrated by a vow to God. It was natural enough that such a contract should, under the religious system which prevailed in Europe, fall under ecclesiastical notice and cognizance, with respect both to its theological and its legal constitution; though it is not unworthy of remark that, amidst the manifold ritual provisions made by the Divine Lawgiver of the Jews for various offices and transactions of life, there is no ceremony prescribed for the celebration of marriage. In the Christian church marriage was elevated in a later age to the dignity of a sacrament, in consequence of its divine institution, and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man,) although, in conformity to the prevailing theological opinion, It revered marriage as a sacrament, still so far respected its natural and civil origin, as to consider; that where the natural and civil contract was formed, it had the full essence of matrimony

without the intervention of the priest; It had even in that state the character of a ^e sacrament; for it is a misapprehension to suppose, that this intervention was required as matter of necessity, even for that purpose, before the Council of Trent. It appears from the histories of that council, as well as from many other authorities, that this was the state of the earlier law, till that council passed its decree for the reformation of marriage; The ^f consent of two parties expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of *Sponsalia per verba de præsenti*, improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonies of marriage, and, therefore, ^g Brower justly observes, *jus pontificium nimis laxo significatu, imo etymologiâ invitâ ipsas nuptias sponsalia appellavit*.---The expression, however, was constantly used in succeeding times to signify *Clandestine Marriages*, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly,

^e Sanchez. Lib. 2. disp. 6. § 2. et lib. 2. disp. 10. § 2.—Father Paul, p. 737.—Pallavicini, lib. 23. Chap. 8.—Pothier, Tit. 3. p. 290.—27. Qu. 2. c. 10. Omne.

^f C. 25. et C. 31. Extra. de Spons. et Matrim.—C. 3. Extra de Sponsa Duorum.—Swinburn, Sect. 4. § 2, 3, 4. et Sect. 18. § 1. —Brower, Lib. 1. Cap. 2. § 8, 9. et Cap. 22. § 12. et Cap. 27. § 21.

^g L. 1. c. 1. n. 6.

to mere engagements for a *future marriage*, which were termed *sponsalia per verba de futuro*, a distinction of *sponsalia* not at all known to the ^h Roman Civil Law. Different rules, relative to their respective effects in point of legal consequence, applied to these three cases---of regular marriages,---of irregular marriages,---and of mere promises or engagements. In the regular marriage every thing was presumed to be complete and consummated both in substance, and in ceremony,---In the irregular marriage every thing was presumed to be complete and consummated in substance, but not in ceremony; and the ⁱ ceremony was enjoined to be undergone as matter of order. In the promise or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony. Mutual ^k consent would release the parties from their engagement; and one party, without the consent of the other, might contract a valid marriage, regularly or irregularly, with another person; but if the parties who had exchanged the promise had carnal ^l intercourse with each other, the effect of that carnal intercourse, was to interpose a presumption of present consent at the

Swinburn, Sect. 3. § 3.

ⁱ Swinburn, Sect. 17. § 1.

^k C. 2. Extra. de Spons. et Matrim.

^l C. 30. et 31. Extra. de Spons. et Matrim.—C. 3. Extra. de Sponsa duorum.—Brower, Lib. 1. Cap. 22.—Swinburn, Sect. 17. § 11.

time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection. I spare myself the trouble of citing from the text books of the Canon Law, the passages that support these assertions. Several of them have been cited in the course of this discussion, and they all lie open to obvious reference in Brower and Swinburn, and other books that profess to treat upon these subjects. The reason of these rules is manifest enough. In proceedings under the Canon Law, though it is usual to plead consummation, it is not necessary to prove it, because it is always to be presumed in parties not shewn to be disabled by original infirmity of body. In the case of a marriage *per verba de præsenti*, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation, unless controverted in like manner. But a promise *per verba de futuro* looked to a future time; the marriage which it contemplated might perhaps never take place. It was ^mdefeasible in various ways; and, therefore, consummation was not to be presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted: it must be a ⁿ promise *cum*

^m Swinburn, Sect. 18. § 1. et Sect. 4. § 2.

ⁿ Swinburn, Sect. 17. § 11.

copula that implied a present acceptance, and created a valid contract founded upon it.

Such was the state of the Canon Law, the known basis of the matrimonial law of Europe. At the Reformation, this country disclaimed, amongst other opinions of the Romish church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an *holy estate*, *holy matrimony*, but it likewise retained those rules of the Canon Law which had their foundation not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognizance of matrimonial causes, enforced these rules, and amongst others, that rule which held an irregular marriage, constituted *per verba de præsenti*, not followed by any consummation shewn, valid to the full extent of voiding a subsequent regular marriage contracted with another person°. A^p statute passed in the reign of Henry VIII. proves the fact by reciting, that “ Many persons after long
“ continuance in matrimony, without any allega-
“ tion of either of the parties, or any other at
“ their marriage, why the same matrimony should

° Brower, l. 22. 12.

p 32 Hen. VIII. cap. 38. sec. 2.

"not be good, just, and lawful, and after the
 "same matrimony solemnized, and *consummate*
 "by carnal knowledge, have by an unjust law of
 "the Bishop of Rome, upon pretence of a former
 "contract made, and *not consummate by carnal*
 "*copulation*, been divorced and separate," and
 then enacts, "that marriages solemnized in the
 "face of the church, and consummate with bodily
 "knowledge shall be deemed good, notwith-
 "standing any pre-contract of matrimony, *not*
 "*consummate with bodily knowledge*, which either
 "or both the parties shall have made." But this
 statute was afterwards repealed, as having pro-
 duced *horrible mischiefs*, which are enumerated
 in very declamatory language in the preamble of
 the statute 2. Edw. VI, and Swinburn, speaking the
 prevailing opinion of his time, applauds the re-
 peal as *worthily and in good reason enacted*. The
 same doctrine is recognized by the temporal
 Courts as the existing rule of the matrimonial
 law of this country, in Bunting's case, 4 Coke 29.---
 "John Bunting, father of the plaintiff, and Agnes
 "Adenshall, contracted marriage *per verba de*
 "*præsenti*, and afterwards, on the 10th of Dec.
 "1555, the said Agnes took to husband Thomas
 "Twede; and afterwards on the 9th of July,
 "Bunting libelled against her in the Court of
 "Audience, *et decret. fuit quod prædict. Agnes*
 "*subiret matrimonium cum præfato Bunting, et*
 "*insuper pronunciatum fuit dictum matrimonium*
 "*fore nullum.*" Though the common law cer-

tainly had scruples in applying the civil^a rights of dower, and community of goods, and legitimacy in the cases of these looser species of marriage: In the later case of Collins and Jesson, 3 Anne, it was said by Holt, Chief Justice, and agreed to by the whole Bench, that “if a contract be *per verba de præsenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement; for it is as much a marriage in the sight of God; as if it had been in *facie ecclesiæ*.” “But a contract *per verba de futuro*, which do not intimate an actual marriage, but refer to a future act, is releaseable,” 2 Salk. 437. Mod. 155. In Wigmore’s case, 2 Salk. 438, the same judge said “a contract *per verba de præsenti* is a marriage; so is a contract *de futuro*; if the contract be executed, and he take her, ’tis a marriage, and they cannot punish for fornication.” In the Ecclesiastical Court the stream ran uniformly in that course. One of the most remarkable is that furnished by the diligence of Dr. Swabey, on account of its striking resemblance to the present case: I mean the case of Lord Fitzmaurice, son of the Earl of Kerry, Coram Deleg. in 1732. There were in that case, as in the present, three engagements in writing: The first was dated June 23, 1724, and contained these words, “We swear

^a Swinburn, Sect. 1. § 2. and Sect. 17. § 29.—Tract. de Repub. Ang. P. 103.—Perkins. Tit. Feoffments, Fol. 40. P. 38. Ed. 3. 12.—1 Roll. Abridg. 341. and 357.—Moor 169.

“we will marry one another.” The second, dated July 11, 1724, was to this effect: “I take you for my wife; and swear never to marry any other woman.” This last contract was repeated in December of the same year. It was argued there, as here, that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it. But the Court, composed of a full Commission, paid no regard to the objection, and found for the marriage, and an application for a commission of review, founded upon new matter alledged, was refused by the Chancellor. Things continued upon this footing till the Marriage Act, 26 G. 2. C. 33. described by Mr. Justice Blackstone, “an innovation on our laws and constitution,” swept away the whole subject of irregular marriages, together with all the learning belonging to it, by establishing the necessity of resorting to a public and regular form, without which the relation of husband and wife could not be contracted.

It is not for me to attempt to trace the descent of the matrimonial law of Scotland since the time of the Reformation. The thing is in itself highly probable, and we have the authority of Craig* for asserting that the Canon Law is its basis there, as it is every where else in Europe, “*totam hanc questionem pendere a jure pontificio,*” though it is likely enough that in Craig’s time,

* Book, 1. Chap. 15. § 3. * Craig, lib. 2. dieg. 18. s. 17.

who wrote not long after the Reformation, the consistorial law might be very *unsettled*, as Mr. Cay in his deposition describes it to have been. It is, however, admitted by that learned Gentleman, that it settled upon its former foundations, for he expressly says, that *the Canon Law in these matters is a part of the law of the land; that the Courts and lawyers reverence the decretals, and other books of the more ancient Canon Law;* and I observe that in the depositions of most of the learned witnesses, and indeed in all the *factums* that I have seen upon these subjects, they are referred to as authorities. Several regulations, both ecclesiastical and civil, canons and statutes, have prescribed modes of celebrating marriage. Mr. Cathcart, in particular, refers to them in his deposition. Some of these appear to have been made in times of great ferment, during the conflict between the Episcopal and Presbyterian parties, and are therefore, I presume, of transitory and questionable authority. Mr. Cathcart infers that the whole of the Scotch statutes hold solemnization by a clergyman, or, as he expresses it, some one assuming the functions of a clergyman, as *necessary*. It rather appears difficult to understand this consistently with the fact, that other marriages have *always* been held legal and valid. What the form of solemnization by a clergyman is, I have not been accurately informed; prescribed ritual forms are not, I believe, admitted by the church of Scot-

land for any office whatever. Whether the clergyman merely receives the declaration as a witness, or pronounces the parties, by virtue of his spiritual authority, to be man and wife, as in our form, does not distinctly appear. I observe that Mr. Gillies says in his deposition, "that to make marriage valid, it is not necessary that it should be celebrated in *facie ecclesiæ*, but *rebus integris* it can only be constituted by a consent adhibited in the presence of a clergyman, or *in some mode equivalent to an actual celebration*." So Lord Braxfield in a loose note, which is introduced, is made to say, "Private consent is not the consent the law looks to; it must be before a priest, or *something equivalent*." Now what are these equivalents? and how to be provided? Are they to be carved out by the private fancy and judgment of the individuals? If so, though equivalent, they can hardly be deemed the regular forms, and yet appear to stand on a footing of equal authority. I observe, likewise, that a marriage before a magistrate is alluded to in some passages, as nearly equal to that before a minister, though certainly not a marriage in *facie ecclesiæ*, in any proper sense of that expression. Sir Ilay Campbell states, in an opinion of his given to the English Chancery[†] in a case furnished to me by Dr. Stoddart, "that mar-

[†] Lib. Reg. A. 1780. F. 552.

“riages irregularly performed without the intervention of a clergyman are censurable, and formerly the parties were liable to be fined or rebuked in the face of the church, *but this for a long time has not been practised.*” The regulations, therefore, whatever they may be, are not penally enforced; and it does not appear that they are enforced by any sense of reputation or of obligation imposed by general practice. The advocates who describe the modes of marriage by the terms *regular* and *irregular*, seem, as far as I can collect, to attribute no very distinctive preference to the one over the other; at any rate the distinction between them is not very strongly marked in the existing usage of that country. Many of the marriages which take place between persons in higher classes of society are contracted in such *irregular* forms, if so to be denominated. They appear to create no scandal; to give no offence. The parties are not reprobated by public opinion, nor is legal censure actually applied. But taking it, that the distinction between the *regular* and *irregular* marriages was much stronger than I am enabled by the present evidence to suppose, the question still remains to be examined, how far actual consummation is required by the law of Scotland in marriages which are so to be deemed *irregular*.

The libel is drawn in a form not calculated to extract simply and directly a distinct statement

of what the law of Scotland may be upon this point; for it collects together all the points of which the party conceives she can avail herself, consummation included, as matters of fact and matters of law, and then alleges, that by the law of Scotland this aggregate constitutes a marriage; without providing for a possible case in which she might establish some of these matters and fail in establishing others, *e. g.* if she failed in proof of a *copula*, but succeeded in establishing a solemn compact. If the law had been more distinctly understood here at the commencement of this suit, the libel would probably have been drawn with more accommodation to the possible state of facts that might ultimately call for the proper specific rule of law. The advocates of Scotland have to a great degree supplied the want of that distinctness in the libel, by bringing forward the distinctions in their answers, and applying what they conceive to be the law applicable to the possible case that may result from the evidence; most of them have stated what they conceive to be the law, first in the case of a promise *de futuro*; secondly, of a promise *cum copulâ*; thirdly, of a solemn declaration or acknowledgment of marriage; and fourthly, of such a declaration accompanied by a *copula*. It may be convenient to consider, first, whether the present case is a case of promise, or of present declaration and acknowledgment. It will be convenient to do so in two respects: The first con-

venience attending it is, that the fact itself is determinable enough upon the face of written existing instruments. It is not to be gathered from the loose recollections of loose verbal declarations, not guarded either in the expressions of those who made them, or in the memory of those who attest them. The second convenience resulting from this is, that a large portion of the enquiry into the other points of the case may, in a great degree, be rendered superfluous; for if these papers contain mere promises, then have I to consider only the law of promises as referable to cases accompanied or unaccompanied by a *copula*, leaving out entirely the law that respects acknowledgment and declaration. On the other hand, if they are to be considered as acknowledgments, then the law of promises may be dismissed, except perhaps sometimes to be introduced incidentally for purposes of occasional illustration.

Whether they are to be considered as promises or declarations must be determined upon the contents of the instruments themselves, on such a view as the plain meaning of the words imports, and upon the information of their technical meaning as communicated by the Scotch lawyers; for it is possible that they may be subject to a technical construction different from their obvious meaning. This is the case in the marriage settlements of Scotland. The words of the *stipulatio sponsalitia* are present declaratory words; the

parties mutually accept each other, but the engagements they enter into are always technically considered to be mere promises *de futuro*. Those who are conversant in the books of the Canon Law will recollect the extremely nice distinctions which that law and its commentators have made between expressions of a very similar import in their obvious meaning, as constituting contracts *de presenti*, or only promises *de futuro*.

The first paper is without date, and is merely a promise. Mr. Dalrymple promises to marry Miss Gordon *as soon as it is in his power*, and she promises the same; it is subscribed by both their names---is endorsed "A sacred promise," and is left in her possession. It is pleaded to be the first that was executed by them, and it is highly reasonable to presume that it was so, for no person, I think, would be content to accept such a paper as this, after having received the papers which follow, marked 2, and 10. The paper marked No. 2, is dated on the 28th of May, 1804, and contains these words, "I hereby *declare* Johanna Gordon is my lawful wife; and "I hereby *acknowledge* John William Henry Dalrymple as my lawful husband." I see no great difference between the expression *declare* and *acknowledge*; the words properly enough belong to the parties by whom they are respectively used, and are perhaps not improperly adapted to the decorums of such a transaction between the sexes. No. 10, is a reiterated declaration on the

part of Mr. Dalrymple, accompanied with a promise "that he will acknowledge Miss Gordon as "his lawful wife the moment he has it in his "power." She makes no repeated declaration, but promises that "nothing but the greatest necessity, (necessity which ——— situation "alone can justify,) shall ever force her to declare this marriage." It is signed by him, and by her, describing herself J. Gordon, *now J. Dalrymple*, and it is dated July 11, 1804. Both the papers are inclosed in an envelope, on which is inscribed "Sacred promises and engagements:" There *are* promises and engagements that would satisfy these terms, independent of the words which contain the declaration of the marriage. At the same time it is to be observed, that the words "promises and engagements" are not improperly applied to the marriage vow itself, which is prospective in its duties, which engages for the performance of future offices between the parties till death shall part them, and to which, in the words of our liturgy, *it plights their troth*, or in more modern language, pledges their good faith for that future performance. I feel some hesitation in acceding to the remark that the paper marked No. 2, is at all weakened or thrown loose by the mere engagement of secrecy, which seems to be the principal, if not the sole object of the latter paper, though Mr. Dalrymple has thrown in a renewed declaration of his marriage; that reiterated declaration, though accompanied with

a promise of secrecy, cannot, upon any view of the case, be considered as a disclaimer of the former. An engagement of secrecy is perfectly consistent with the most valid, and even with the most regular marriages. It frequently exists even in them from prudential reasons; from the same motives it almost always does in private or clandestine marriages. It is only an evidence against the existence of a marriage, when no such prudential reasons can be assigned for it, and where every thing arising from the very nature of marriage calls for its publication.

Such is the nature of these exhibits; first, a promise; secondly, that promise merged in the direct acknowledgment of the accomplished fact; thirdly, a renewed admission of the fact on his side, with a mutual engagement for secrecy, till the proper time for disclosure should arrive.

In these papers, as set up by Miss Gordon, resides the *constitution*, as some of the gentlemen who have been examined call it, or as others of them term it, the *evidences* of the marriage; for it is matter of dispute between these learned persons, whether such papers, when free from all possible impeachment, are *constituents*, or merely *evidences* of marriage. It appears to be a distinction not very material in its effects; because if it is to be considered that such papers so qualified are only to be treated as *evidences*, yet if free from all possible impeachments on the grounds on which the law allows them as evidences to be impeached,

they make full faith of the marriage, they sustain it as effectually, as if, according to other ideas, they directly constituted it; they have then become *præsumptiones juris et de jure*, which establish the same conclusion, although in another way.

But these papers must be taken in conjunction with the letters which may controul or confirm them.---What is the effect of the letters? In almost all of them Mr. Dalrymple addresses Miss Gordon as his wife, and describes himself as her husband. In the first letter he insists upon it, that she shall draw upon him for any money she may stand in need of, “for it is her right,” and “in accepting of it she will prove her acknowledgment of it.” *Her* sister he calls *his* sister. This letter appears by the post-mark to have been written before No. 2, and therefore has been said to be entirely premature, and to give an interpretation to subsequent expressions of the like kind.---But, *non constat*, that it might not be written long after the undated promise by which the parties entered into a solemn engagement to marry. Verbal declarations similar in their imports to the contents of No. 2 might have passed, for it can hardly be conceived that such a paper could have passed without many preliminary verbal declarations to the same effect. People do not write in that manner, till after they have talked together in the same style.---The post-mark on the letter, No. 4, is May the 30th, and this letter refers to what passed on the night

after the paper, No. 2, bears date; in it, he says,
 “ You are my wife, to retract is impossible and
 “ ever shall be; I have proved my legal right to
 “ protect you, which I have most fully establish-
 “ ed; nothing in this world shall break those
 “ ties.” The letter, No. 5, has these expres-
 “ sions: “ Remember you are mine, that God Al-
 “ mighty may preserve my wife is the prayer of
 “ her husband.” No. 6, “ It grieves me to suffer
 “ you five minutes from your husband; nothing
 “ can change my sentiments, independent even
 “ of those sacred ties which unite us.---Nothing
 “ ever can or should (if ’twere possible) annul
 “ them.---Put that confidence in me which your
 “ duty requires.---That God may ever preserve
 “ my wife, and inspire her with the purest love
 “ for her husband, is the first wish of her adoring
 “ ——.” No. 8, “ I have received letters from
 “ town which say that Lord Stair has heard of
 “ our marriage.” No. 12, “ Whatever money
 “ you may want draw on me for without scruple.”
 No. 13, dated May 29, 1805, “ Situated as you
 “ are, nothing could strengthen the ties which
 “ unite us, therefore wish it not to be mentioned
 “ that you are my wife till it can be done without
 “ injury to ourselves. I insist upon a paper ac-
 “ knowledging yourself as my wife.” No. 14,
 dated June 10, 1805, “ Forward to me the paper
 “ I requested in my last, and acknowledge your-
 “ self my wife---that as we are not immortal I
 “ may leave you in trust of a friend the small

“remains of what once was a tolerable fortune; you can’t refuse on any legal grounds; do my dearest wife forward it.” In No. 15, dated June 28, 1805, he says, “I would not give up the title of your sister’s brother for any consideration. Don’t deny yourself what you require, as I should not wish my wife to appear in any thing not consistent with her rank; I will arrange before my departure money-matters, so as to give you every opportunity of gratifying your taste, or any other fancy.” In the letter marked 14, he asks her permission to go abroad on account of the distress of his affairs. “Will you allow me to endeavour by a short absence to rectify these things? In asking your consent, I humbly conjure you, dearest love, to pardon me.----I solemnly assure you I will not be absent from you very long.”---- In another part of this letter he points out the period of four months as the probable duration of his absence.

Now it is impossible to say that the exhibits, No. 2 and 10, are at all weakened by the strong conjugal expressions contained in these letters.--- Taken together, they in their plain and obvious meaning import a recognition of an existing marriage. What is their technical meaning? That information we must obtain from the learned persons who have been examined.---Mr. Erskine, Mr. Hamilton, Mr. Cragie, Mr. Hume, and Mr. Ramsay, are all clearly of opinion that they are

“*present declarations.*”---Mr. Cay is equally clear that they “are contracts *de præsenti.*”---Sir Ilay Campbell describes them as “*very explicit mutual declarations of marriage* between the parties.”---Mr. Clerk says that No. 2, is evidence of a very high nature to prove that “a marriage *had been* contracted by the parties; it is a *full and explicit declaration* of a contract *de præsenti.*” “No. 10,” he says, “imports little more than No. 2; it is *important evidence to the same effect.*” Mr. Cathcart and Mr. Gillies who hold a *copula* in all cases necessary, do not distinctly say under which class of cases the present falls.

Upon this view I think myself entitled to lay aside, at least for the present, the rules of law that apply to promises. The main enquiry will thus be limited to two questions, whether by the law of Scotland a present declaration *constitutes* or *evidences* a marriage *without a copula*; and secondly, whether, if it does not, the present evidence supplies sufficient proof that such a requisite has been complied with.

The determination of the first question must be taken from the authorities of that country, deciding for myself and for the parties entrusted to my care, as well as I can upon their preponderance where they disagree, and feeling that hesitation of judgment which ought to accompany any opinion of mine upon points which divide the opinions of persons so much better instructed in all the learning which applies to them.

The authorities to which I shall have occasion to refer are of three classes; first, the opinions of learned professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight; and thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the Court which has to weigh them *stare decisis*.

Before I enter upon this examination I will premise an observation, from which I deduce a rule that ought in some degree to conduct my judgment; the observation I mean, is this, that the Canon Law, as I before have described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. And whether that law remains entire, or has been varied, I take it to be a safe conclusion, that in all instances where it is not proved that the law of Scotland has resiled from it, the fair presumption is, that it continues the same. Shew the variation, and the Court must follow it; but if none is shewn, then must the Court lean upon the doctrine of the ancient general law; for I do not find that Scotland set out upon any original plan of deserting the ancient matrimonial law of Europe, and of forming an entire new code upon

principles hitherto unknown in the christian world. It becomes of importance therefore, to consider what is the ancient general law upon this subject, and on this point it is not necessary for me to restate, that by the ancient general law of Europe, a contract *per verba de præsenti*, or a promise *per verba de futuro cum copulâ*, constituted a valid marriage without the intervention of a priest, till the time of the Council of Trent, the decrees of which Council were never received as of authority in Scotland.

It appears from the case of Younger, cited by Sir Thomas * Craig, that in his time the practice upon a contract *de præsenti* was the same in Scotland as it continued to be in England till the period of the Marriage Act, viz. to compel the reluctant party to a public celebration as matter of order. This was soon discontinued in Scotland, on account of the apparent incongruity of compelling a man to marry against his will, but with a solemn profession of love and affection to the party who compelled him. But though they discarded the process of compulsion for some such reason as this which is stated by Mr. Hume, they might still consistently retain the principle, that a present consent constituted a valid marriage. Whether it was retained, is the question I have to examine, assuming first (as I

* Lib. 2, cæg. 18. s. 19.

have done) that if the contrary is not shewn, it must so be presumed.

The evidence of opinions on this point, taken in this and similar cases, and under similar authority, stands thus :---Mr. Erskine, Mr. Cragie, Mr. Hamilton, Mr. Hume, and Mr. Ramsay, who have been examined upon the question at present before the Court, are all clear and decided in their opinions, that a declaration *per verba de præsenti* without a *copula* does by the law of Scotland constitute a valid marriage. I will not enter into an examination of their authorities where they agree---*Oportet discentem credere*, though, where authorities differ, it is a rule which cannot be universally applied. Still less shall I presume to discuss their reasonings, except in a few instances, where, however desirous to follow, I find a real inability to accompany them to their conclusions. To the authorities above stated, I must add the opinions of the learned persons examined upon the case of *Beamish and Beamish*; a case which came before this Court upon a similar question of a Scotch marriage of an Englishman with a Scotch woman in the year 1788, and in which the Court of Arches to which it was appealed, upon the informations of Law obtained from the learned advocates of Scotland, pronounced for the validity of the marriage. Mr. John Millar, Professor of law at Glasgow, there said, “ that by the law of Scotland the ceremony “ of being married by a clergyman was not neces-

"sary to constitute a valid marriage. The deli-
 "berate consent of parties entering into an agree-
 "ment to take one another for husband and wife
 "was sufficient to constitute a legal marriage, as
 "valid in every respect as that which is cele-
 "brated in the presence of a clergyman.---Con-
 "sent must be expressed or understood to be
 "given *per verba de præsenti*; for consent *de*
 "*futuro*, that is, a promise of marriage, does not
 "constitute actual marriage. By the Scotch law,
 "the deliberate consent of parties constitutes
 "marriage."---Mr. John Orr, in his deposition
 said. "By the laws of Scotland, a solemn ac-
 "knowldgment of a marriage having happened
 "between the parties, whether verbally, or in
 "writing, is sufficient to constitute a marriage,
 "whether expressed in *verbis de præsenti*, or in
 "an acknowledgmet that the marriage took
 "place at a former period. A promise followed
 "by a *copula* would constitute a valid marriage;
 "and a written instrument containing not a con-
 "sent *de præsenti*, but only stating that the par-
 "ties were married at a certain time, or even a
 "solemn verbal acknowledgmet to this effect,
 "although no actual marriage had taken place,
 "is sufficient to constitute a marriage by the law
 "of Scotland."---Mr. Hume said, "Marriage is
 "constituted by consent of parties to take or
 "stand to each other in the relation of husband
 "and wife.---The mode or form of consent is not
 "material, but it must be *de præsenti*." Mr.

Erskine and Mr. Robertson agreed in saying, "that a deliberate acknowledgment of the parties that they were married, though not containing a contract *per verba de præsenti*, is sufficient evidence of a marriage, without the necessity of proving the actual celebration." Mr. Clerk, Mr. Gillies, and Mr. Cathcart, who are examined in the present case on the part of Mr. Dalrymple, are equally clear in their opinions on the other side of the question. Mr. Cay inclines to think a *copula* necessary, "although well aware that a different opinion prevails among lawyers on this point." Sir Ilay Campbell's opinion upon this important point, which the Court was particularly eager to learn, is through some inaccuracy of the examiner transmitted in such a manner as to leave it rather a matter of question which of the two opinions he favours; for in the former part of the deposition he is made to say, that "by the general principles of the law of Scotland, marriage is *perfected* by the mutual consent of parties accepting each other as husband and wife." In words so express and unqualified, pointing to nothing beyond the mutual acceptance of the parties, as *perfecting* a marriage without reference to any future act as necessary to be done, I thought I had received a judgment of high authority in favour of the ancient rule, that consent without a *concubitus* constitutes a marriage: but in a latter part of the deposition, he lays it down, that this acknowledgment *per verba de præsenti* must be attended with

personal intercourse, prior or subsequent; if so, it throws a doubt upon the precise meaning of the former position, which had declared a marriage perfected by mere mutual acceptance. "Without such intercourse," Sir Ilay Campbell says, "they would resolve into mere *stipulatio sponsalitia*; where the words are *de præsenti*, but "the effect future."---And here I have to lament the difficulty I find in following so highly respectable a guide to the conclusion, on account of a distinction that strongly impresses itself upon my apprehension. In the *stipulatio sponsalitia* the words *de præsenti* are qualified by the future words that follow, and which imply something more is to be done---a public marriage to take place; but in the case supposed of a clear present declaration, no such qualifying expressions occur---nothing pointing to future acts as the fulfilment of a present engagement. I find the greater difficulty in ascertaining the decided judgment of this very eminent person, from considering an opinion of his given into the ^w English Court of Chancery, upon a requisition from that Court, and on which that Court acted in the case of the Scotch marriage. In that case, the case of the marriage of Thomas Thomasson, and Catharine Grierson, the opinion dated August 18th, 1781, and remaining of record in Chancery, states a present contract to be sufficient to vali-

^w Lib. Reg. A. 1780. F. 552.

date a marriage, without any mention of a *copula*, antecedent, or subsequent; the known accuracy of his judgment would never have allowed him to omit this, if it had been considered by him at that time a necessary ingredient in the validity.--- I might, perhaps, without much impropriety, be permitted to add another legal opinion of equal authority---the opinion of a person, whose death is justly lamented as one of the greatest misfortunes that have recently visited that country.---I need not mention the name of the Lord President Blair, upon whose deliberate advice and judgment this present suit has been asserted in argument, and without contradiction, to have been brought into this Court.

Upon this state of opinions, what is the duty of the Court? How am I to decide between conflicting authorities? For to decide I am bound.--- Far removed from me be the presumption of weighing their comparative credit; it is not for me to construct a scale of personal weight amongst living authorities, with most of whom I am acquainted no otherwise than by the degree of eminence which situation, and office, and public practice, and reputation, may have conferred upon them.---In such a case I am under the necessity of quitting the proper legal rule of estimating *pondere, non numero*; I am compelled to attend a little to the numerical majority (though I admit this to be a sort of *rusticum judicium*), and finding that much the greater number of learned per-

sons recognize a rule consonant to that which in ancient times governed the subject universally, I think I am not qualified to say, that as far as the weight of opinion goes, it is proved that the law of Scotland has innovated upon the ancient general rule of the marriage law of Europe. It appears to me, that the common mode of expression used in Scotland, which is constantly recurring, is no insignificant proof of the contrary doctrine. It is always expressed---Promise *cum copulâ*, the *copula* is in the ordinary phrase, a constant adjunct to the promise,---never to the *contract de præsenti*, strongly marking the known distinction between the two cases, that the latter by itself worked its own effect, and that the other would be of no avail, unless accompanied with its constant and express associate.

I come now to the text authorities of the Scotch writers:---the first to whom I shall refer is* Craig. It does not appear to me, that he is of great authority either one way or the other: he admits generally that the question of marriage is not *hujus instituti propria, sed judicis ecclesiastici*, and the case of Younger, which he cites from the Court of the Commissaries, is a case not of a declaration *de præsenti*, but of a promise *cum copulâ*; unless, therefore, it is previously established, that a promise *cum copulâ* converts itself in all respects, and in all its bearings, into a contract

* Cragii jus feudale, lib. 2. dieg. 18. s. 17, & 19.

de præsenti without a *copula*, (which certainly it does in the Canon Law, and is so recognized in the majority of the opinions upon the law of Scotland), it is no direct authority; and the conclusion is still more weakened, by observing, that in that case a judicial sentence of the Commissaries had been actually obtained, and that the point determined by the common law was a mere question of succession upon legitimation, which may depend upon many considerations extrinsic to the original validity of the marriage.

A more pertinent authority, and of higher consideration, is Lord Stair, an ancestor, I presume, of one of the present parties---a person whose learned labours have at all times engaged the reverence of Scotch jurisprudence. He treats of this very question, stating it as a *question*, and determines it thus: ʔ “It is not every consent to the married state that makes matrimony, but consent *de præsenti*, not a promise *de futuro matrimonio*.” The marriage consists not in “the promise but “in the present consent, whereby they accept “each other as husband and wife, whether by “words expressly, or tacitly by marital cohabitation, or acknowledgement, or by natural “commixtion where there hath been a promise “preceding, for therein is presumed a conjugal “consent *de præsenti*, but the consent must specially relate to that conjunction of bodies as

ʔ Stair's Institut. lib. 1. tit. 4. sec. 6.

“being then in the consenter’s capacity, otherwise it is void.” I shall decline entering into the distinctions and refinements which have attempted to convert the obviously plain meaning of this passage into one of a very different import. It does appear to me to establish the opinion of this very learned person to be, that without a commixtion of bodies immediately following, (though in all cases to be looked to as possible, and at some time or other to take place,) a present valid marriage is constituted by a contract *de præsenti*.

Sir George Mackinsie, ^z Lord Advocate under King Charles and James the Second, whose authority carries with it a fair proportion of weight, says “Consent *de præsenti* is that in which marriage doth consist. Consent *de futuro* is a promise; this is not marriage, for either party may *resile rebus integris*,” manifestly intimating that this could not be done under the consent *de præsenti*.

Another authority of more modern date, but intitled to the greatest respect, is Mr. Erskine, a writer of institutional law; by him it is expressly laid down ^a that “marriage consists in the present consent, whether that be by words expressly, or tacitly, by marital cohabitation, or by acknowledgment. Marriage may without doubt

^z Mackinsie Institut. book 1. tit. 6. sec. 3.

^a B. 1. tit. 6. sec. 5.

“ he *perfected* by the consent of parties declared “ by writing, provided the writing be so conceived as to import a present consent.” Nothing upon the direct meaning of these words can be more clear, than that he held bodily conjunction not necessary in a present contract. The very note of the anonymous editor, to whom, as an anonymous editor, no authority can be allowed, whatever may be the weight that really belongs to it, admits this; for he says, “ From the later decisions of the Court, there is reason to doubt, if it “ can *now* be held as law, that the private declarations of parties, even in writing, are *per se* “ equivalent to actual celebration of marriage;” admitting, by that mode of expression, that such was the doctrine of the text and of the times when it was composed. Mr. Clerk says, “ *he considers the doctrine to be incorrect,*” thereby likewise admitting it to be the doctrine contained in these words.

I am not enabled to say how far Mr. Hutcheson’s book can be considered as a work of authority. It, however, carries with it most respectable credentials, if it be true what has been asserted in the argument, that it has been sanctioned by the approbation of several of the Judges of Scotland, and particularly of Sir Ilay Campbell, who refers to it in his deposition as a book of credit, and under whose patronage it is published, and to whose perusal it is said to have been submitted previously to its publication. His

statement of the law of Scotland is full and explicit in favour of the doctrine, that private mutual declarations require no bodily consummation to constitute a marriage. He says that the ancient principle to this effect has been *happily* retained in the law of Scotland, speaking with similar feelings of attachment to it, which are observable in our Swinburn, when he talks of the Repealing Statute of Edward VI. as *being worthily and for good reasons enacted*, though a regard to domestic security has induced us to extinguish it entirely in this part of the island by the legislative provisions of later times. Mr. Hutcheson mentions it as a fact, that in the case of M'Adam against Walker, *none of the Judges, who dissented from the judgment, disputed that doctrine of the law*. His testimony to such a fact is equivalent to that of any person of unimpeached credit---even to that of Lord Stair or Mr. Erskine; he has asserted it in the face of his profession and the public, and at the hazard of being contradicted, if he has stated it untruly, by the united voice of the whole bench and bar of his country.

In support of the opposite opinion, no ancient writer of authority has been cited. The only writer named, is of very modern date, Lord Kaimes, a man of an ingenious and inquisitive turn of mind, and of elegant attainments, but whose disposition, as he admits, did not lead him to err on the side of excessive deference to autho-

rity and establishment. The very title of his book is sufficient to excite caution; *elucidations respecting the law of Scotland* may seem to imply rather proposed improvements than expositions of the existing law. He says in his preface, that "he brings into the work the sceptical spirit, "wishing and hoping to excite it in others, and "confesses that he had perhaps indulged it too "much." But supposing that it is liable to no objection of this kind, the whole of his chapter on these subjects, so far as this question is concerned, relates entirely to the effect of a promise *de futuro cum copulâ*, which has no application to the present case, unless it is assumed, that this amounts to the same thing identically in law, to all intents and purposes, as a contract *de præ-senti*. I must add that his extreme inaccuracy, in what he ventures to state with respect both to the ancient Canon Law and to the modern English law, tends not a little to shake the credit of his representations of all law whatever. In this^b chapter he asserts that by the *present* law of England, a mutual promise of marriage *de futuro* is a good foundation to compel a refractory party to complete the marriage, by process in the Spiritual Court. I mean no disrespect to the memory of that ingenious person, when I say, that it is an extraordinary fact that it should have

^b Page 32,

been a secret to any man of legal education in any part of this island, that the law of England has been directly the reverse for more than half a century.

No other reference to any known writer of eminence is produced; it is easy, therefore, to strike the balance upon this class of authorities; they are all in one scale, a very ponderous mass on one side, and totally unresisted on the other.

I come thirdly, to the last and highest class of authorities, that of cases decided in the Scotch tribunals.---Many of these have been alluded to in the learned expositions which have been quoted, but such of them (and they are not few in number) as apply to the cases of promises *de futuro cum copulâ* I dismiss for the present, observing only, that if a promise of this kind be equivalent to a contract *de præsentî nudis finibus*, the result of those cases appears to me strongly to incline to the conclusion deduced from the two former classes of authority.

With regard to decided cases, I must observe generally, that very few are to be found in any administration of law in any country upon acknowledged and settled rules. Such rules are not controverted by litigation, they are therefore not evidenced by direct decision: They are found in the maxims and rules of books of text-law. It would be difficult, for instance, to find an English case in which it was directly decided,

that the heir takes the real, and the executor the personal estate; yet though nothing can be more certain, it is only incidentally and *obiter* that such a matter can force itself upon any recorded observation of a Court; equally difficult would it be to find a litigated case in the Canon Law, establishing the doctrine, that a contract *per verba de præsenti* is a present marriage, though none is more deeply radicated in that law.

The case of *Cochrane* versus *Edmonston*, before the Court of Session in the year 1804, was a case of contract *de præsenti*, and of this I shall take the account given by Mr. Clerk. The Court there held, "that a written acknowledgment *de præsenti* was sufficient to constitute a marriage. "The interlocutor of the Lord Ordinary, which the Court adhered to, rests upon the consent of parties to constitute a marriage *de præsenti* without referring to the *copula*." Mr. Clerk says, "he cannot suppose the Court overlooked the very material circumstance of the *copula*," which did exist in that case, and which he says "would have been sufficient with a bare promise to bind the man to marriage."---I find great difficulty in acceding to this observation, particularly when it is stated that the Court adhered to the interlocutor, which expressed the directly contrary doctrine, and even if it had not so done, it appears to me to be an inaccuracy too striking to attribute to that Court, that they should have de-

clared consent *de præsenti* sufficient, without express mention of the *copula*, if they had thought it a necessary ingredient in the validity of the marriage. What Mr. Clerk says of his disposition to advise an appeal in particular cases, is not necessary to be noticed in the present consideration, which regards only actual decisions, and not private opinions, however respectable. He admits expressly, that on the evidence of the report, he thinks it at least highly probable, that some such doctrine as that held by Mr. Erskine was laid down in that case by the Judges.

The next case which I shall mention is that of Taylor and Kello, which occurred in 1786. This was an action of declarator of marriage instituted by Patrick Taylor against Agnes Kello, and was grounded on a written acknowledgment in the following words: "I hereby declare you, Patrick Taylor, in Birkenshaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." Kello delivered this written declaration to Taylor, and received from him another *mutatis mutandis* in the same terms, which she afterwards destroyed. There was no sufficient evidence to support the *concubitus*, but the Report states, that *the Court, in its decision, held this to be out of the question.* The Commissaries "found the mutual obligations relevant to infer marriage between the parties, and found them married persons accordingly." This sentence

was affirmed by the Court of Session, though that Court was much divided upon the occasion, some of the Judges considering the declaration as merely intended to signify a willingness to enter into a regular marriage; but a majority of the Court thought, in conformity to the judgment of the Commissaries, that the marriage was sufficiently established. This sentence was reversed by the House of Lords, but upon the express grounds that neither of the parties understood the papers respectively signed by them to contain a final agreement to consider themselves as married persons; on the contrary it was agreed that the writing was to be delivered up whenever it was demanded; The whole subsequent conduct of the parties proving this sort of agreement. It appears then that this was not considered by the House of Lords an *irrevocable* contract, such as that of marriage is in its own nature, from which the parties cannot resile even by joint consent, much less on the demand of one party only. This case, I think, goes strongly to affirm the doctrine, that an *irrevocable contract de præsenti* does of itself constitute a legally valid marriage. Mr. Cathcart admits in his deposition that this sentence of the Commissaries, confirmed by the Court of Session, would have been a decision in favour of the doctrine, that a contract *de præsenti* constitutes a marriage, if it had not been reversed by the House of Lords. But as it was

clearly reversed upon other grounds, the authority of the two Courts stands entire in favour of the doctrine. Mr. Gillies thinks the reversal hostile to the doctrine, but he has not favoured the Court with the grounds on which he entertains this opinion. Mr. Clerk contents himself with saying, that the doctrine is not recognized: Most assuredly it is not disclaimed; on the contrary, the presumption is, that if the contract had been considered *irrevocable*, the House of Lords would have attributed to it a very different effect.

In the case of Inglis against Robertson, which was decided in the same year, the Commissaries sustained a marriage upon a contract *de præ-senti*, and this sentence was affirmed by the Court of Session upon appeal, and afterwards by the House of Lords. The accounts vary with respect to the proof of *concubitus* in this case, which renders it doubtful whether the decision was grounded on the acknowledgment only, or referred likewise to the *copula*. If it had no such reference, then it is a case directly in point: but if it had, it certainly cannot be insisted upon as authority upon the present question.

The case of Ritchie and Wallace, which was before the Court of Session in 1792, is not reported in any of the books, but is quoted by Mr. Hamilton, who was of counsel in the cause. It was the case of *a written declaration of an exist-*

ing marriage, but accompanied with a promise that it should be celebrated in the church at some future and convenient time. This very circumstance of a provision for a future public celebration might of itself have raised the question, in the minds of some Judges, whether these acknowledgments could be considered as relating to a matrimonial contract already formed and perfected in the contemplation of the parties themselves; and this is sufficient to account for the diversity of the opinion of the Judges upon the case, without resorting to any supposed difference of opinion on the general principle of law now controverted. The woman was pregnant by the man when she received this written declaration from him, but, as I understand the case, nothing rested in judgment upon this fact; for Mr. Hamilton says, the woman *founded on the written acknowledgment as a declaration de presenti* constituting a marriage, which conclusion of law was controverted by the man; but the Court, by a majority of six Judges to three, found the *acknowledgment libelled, relevant to infer the marriage.*

The case of M'Adam against Walker, (13th of November, 1806,) which underwent very full discussion, is by all parties admitted to be a direct decision upon the point, though it was certainly attended with some difference of opinion amongst the Judges by whom it was decided. In that case Elizabeth Walker had cohabited with Mr.

M'Adam, and borne him two daughters. In the presence of several of his servants, whom he had called into the room for the purpose of witnessing the transaction, he desired Elizabeth Walker to stand up and give him her hand; and she having done so, he said, "This is my lawful wife, and these my lawful children." On the same day, without having been alone with Walker during the interval, he put a period to his existence. The Court held the children to be legitimate. It appears clearly that in this case there had been a *copula* antecedent, though none could have taken place subsequent to the declaration: It could not therefore have been upon the ground of want of *copula* that Sir Ilay Campbell, who holds a prior *copula* as good as a subsequent one, joined the minority in resisting that judgment. It is stated by Mr. Hutcheson, as a matter of fact, that "none of the Judges disputed the law," but there were other grounds of dissent arising out of the circumstances of the case, unconnected with the legal question. "The Judges entertained doubts of the sanity of Mr. M'Adam at the time of the marriage; they considered also, that when he made the declaration he had formed the resolution of suicide, and therefore did not mean to live with the woman as his wife." It is said that this decision of the Court of Session is appealed from, and therefore cannot

be held conclusive upon the point. At any rate it expresses the judgment of That Court upon the principle, and the appeal, whatever the ground of it may be, does not shake the respect which I owe to that authority whilst it exists unshaken.

I might here call in aid the numerous cases where promise *cum copulâ* has been admitted to constitute a marriage, if the rule of the Canon Law, transfused into the law of Scotland, be sound, that *copula* converts a promise *de futuro* into a contract *de præsenti*. If it does not, if *copula* is required in a contract *de præsenti*, what intelligible difference is there between the two---between a promise *de futuro* and a contract *de præsenti*?---None whatever. They stand exactly upon the same footing.---A proposition, I will venture to say, never heard of in the world, except where positive regulation has so placed them, till these recent controversies respecting the state of the marriage law of Scotland.

I might also advert to the marriages at Gretna Green, where the blacksmith supplies the place of the priest or the magistrate. The validity of these marriages has been affirmed in England upon the certificates of Scotch law, without reference to any act of consummation, for such I think was clearly the exposition of the law as contained in the opi-

nion of Sir Ilay Campbell, upon which the English Court of Chancery founded its decision in the case of *Grierson* and *Grierson*.

What are the cases which have been produced in contradiction to this doctrine? As far as I can judge, none,---except cases similar to those which have been already stated, where the superior Court has overruled the decisions of the Court below, and pronounced against the marriage, upon grounds which leave the principle perfectly untouched.---The case of M^r Lauchlan *contra* Dobson; in December, 1796, was a case of contract *per verba de præsenti* where there was no *copula*, in which the Commissaries declared for the validity of the marriage, and the interlocutor was altered by the Court of Session. But upon what grounds was that sentence reversed? Mr. Hutcheson states, that “the Court did not think there was sufficient “evidence of a real *de præsenti* matrimonial consent.” Mr. Hume says, “the conduct of the “parties had been variable and contradictory,” and Sir Ilay Campbell says, “there were circumstances tending to shew that the parties did not “truly mean to live together.” The dicta of Lord Justice Clerk M^r Queen have been quoted and much relied upon; but I must observe, that they come before the Court in a way that does not entitle them to much judicial weight: They are stated by Mr. Clerk to be found in notes of the hand-writing of Mr. Henry Erskine, who is not himself examined for the purpose of authenticat-

ing them, although interrogatories are addressed to other persons with respect to other legal authorities, for which they are much less answerable. They are taken very briefly, without any context, nor is it stated in what manner, whether in the form of discussion or decision, they fell from that learned Judge. He is, however, made to say, "The case of M'Lauchlan against Dobson new, but the law is old and settled. Two facts admitted *hinc inde*, no celebration, no *concubitus*, nor promise of marriage followed by *copula*; contract as to land not binding till regularly executed, unless where *res non sunt integræ*." This proposition that, "contract as to land not binding till regularly executed," proves little, because it may refer to rules that are confined to agreements respecting that species of property, and even with regard to that species of property the contract may be sufficiently executed by the signing of articles or deeds, though there is no entry upon the land. "A promise without *copula* *locus pœnitentiæ*---even verbal consent *de præ-senti* admits *pœnitentia*,"---that is the matter to be proved. "Form of contracts contains express obligation to celebrate; till that done either party may resile."---The reason is that these same forms contain words which qualify the present engagement by giving them a mere promissory effect. "Private consent is not the *consensus* the law looks to. It must be before a priest or something equivalent; they must take the oath

“of God to each other;” this may be done in private to each other, as it actually was done in the case of Lord Fitzmaurice: “a present consent not followed by any thing may be mutually be given up, but if so, it cannot be a marriage.” To be sure if the propositions contained in these dicta are correct, if it be true that a contract *de præsenti* may be mutually given up, then certainly it cannot constitute a marriage; but that is the very question which is now to be determined upon the comparative weight of authorities; I admit the authority of Lord Braxfield, deliberately and directly applied to any proposition to which his mind was addressed, to be entitled to the highest respect; But I have already adverted to the loose manner in which these dicta are attributable to him, and it is certainly a pretty strong circumstance against giving full effect to these dicta so introduced without context and without authentication, that Lord Braxfield, as Lord Ordinary, refused the Bill of Advocation in the case of Taylor and Kello complaining of the sentence of the Consistorial Court, which found “mutual obligations relevant to infer a marriage.”

The other case that has been mentioned, is that of M'Innes against More, which came before the House of Lords upon appeal in the year 1782. The facts therein were, that the man, at the woman's desire, had signed the acknowledgment not for the purpose of making a marriage, but merely as a colour to serve another and dif-

ferent purpose mutually concerted between them, namely, that of preventing the disgrace arising from the pregnancy of the woman. The Commissaries and the Court of Session had found the facts relevant to infer a marriage, but the House of Lords, considering the transaction as a mere blind upon the world, and that no alteration of the *status personarum* was ever intended by the parties themselves, reversed the sentence, and pronounced against the marriage.

I am not aware of any other decided cases which have been produced against the proposition that a contract *de præsenti* (be it in the way of *declaration* or *acknowledgment*) *constitutes*, or, if you will, *evidences* a marriage. It strikes me, upon viewing these cases, that such of them as are decided in the affirmative, have been adjudged directly upon this *principle*, and that where they have been otherwise determined, it turns out that they have rested upon *specialties*, upon circumstances which take them out of the common principle, and produce a determination that they do not come within it. If they do not go directly to the extent of affirming the principle, they at least imply a recognition of it, a sort of tacit assent and submission to its authority, an acknowledgment of its being so deeply intrenched in the law, as not to be assailable in any general and direct mode of attack. The exceptions prove the rule to a certain degree. It was proved in all

those cases where there was a judgment apparently contradictory, that in truth they were not real matrimonial contracts *de præsenti*. The effect was not attributed to them, because they were not considered as such contracts. I cannot but think, that when case upon case came before the House of Lords in which that principle was constantly brought before their eyes, they would have reprobated it as vicious if they had deemed it so, instead of resorting to circumstances to prove that the principle could not be applied to them. I may without impropriety add, that the Lord Chancellors of England have always, as I am credibly informed, in stating their understanding of Scotch law upon such subjects to the House of Lords, particularly Lord Thurlow, been anxious to hold out that law to be strictly conformable to the canonical principles, and have scrupulously guarded the expressions of the public judgments of the House, against the possible imputation of admitting any contrary doctrine.

Upon the whole view of the evidence applying to this point, looking first to the rule of the general matrimonial law of Europe,---to the principle which I venture to assume, that such continues to be the rule of Scotch matrimonial law, where it is not shewn that that law has actually resiled from it,---to the opinions of eminent professors of that law,---to the authority of text writers, and to the still higher authority of decided cases (even

without calling in aid all those cases which apply a similar rule to a promise *cum copulâ*) I think that being compelled to pronounce a judgment upon this point, I am bound to say, that I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract *de præsenti* does not require consummation in order to become "very matrimony;" that it does, *ipso facto*, *et ipso jure*, constitute the relation of man and wife. There are learned and ingenious persons in that country, who appear to think this rule too lax, and to wish to bring it somewhat nearer to the rule which England has adopted; but on the best judgment which I can form upon the subject, it is an attempt against the general stream of the law, which seems to run in a direction totally different, and is not to be diverted from its course by efforts so applied. If it be fit that the law of Scotland should receive an alteration, of which that country itself is the best judge, it is fit that it should receive that alteration in a different mode than that of mere interpretation.

When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract, and which in truth appear to me to be very little more than what all law requires for all contracts of every description, and without which an apparent contract upon any subject is, in truth, no contract at all; for having been led, by the man-

ner in which these qualifications are sometimes described, to suppose at first, that they were of a *peculiar and characteristic* nature, I really cannot, upon consideration, discover in them any thing more than the *ordinary* qualifications requisite in all contracts. It is said that the marriage contract must *not be extorted by force or fraud*. Is it not the general law of contracts, that they are vitiated by proof of either? In the present case, *menace* and *terror* are pleaded in Mr. Dalrymple's allegation as to the execution of the first *contract* No. 2, for as to the *promise* No. 1, he admits that it was given *merely at the entreaties and instigation of the lady*, (an admission not very consistent with the suggestion of the terror afterwards applied) but he asserts that he executed this contract, "being absent from his regiment, without leave, "alone with her, and unknown to her father, and "urged by her threats of calling him in."---What was to be the effect of calling in the father, which produced so powerful an impression of terror in his mind, he does not explain; still less does he attempt to prove the *fact*, for he has not read the only evidence that could apply to it, the sworn answers of the lady to this statement of a transaction passing secretly between themselves, and in which answers it is positively denied. This averment of menace and terror is perfectly inconsistent with every thing that follows; with the reiterated declaration contained in No. 10, and with the

letters which he continued to write in the same style for a year afterwards. Could the paper No. 10, have been executed by a man smarting under the atrocious injury of having been compelled by *menaces* to execute one of the like import? Could these letters, breathing sentiments of unalterable fondness, have been addressed to the person by whom he had been so treated? Nothing can be apparently more unfounded than this suggestion of menace and terror. It is said that it must be a *deliberate* contract. It is, I presume, implied in all contracts, that the parties have taken that time for consideration which they thought necessary, be that time more or less, for no where is there assigned a particular *tempus deliberandi* for the marriage contract, any more than for any other contract. It is said that it must be *serious*, so surely must be all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever; at the same time it is to be presumed, that serious expressions applied to contracts of so serious a nature as the disposal of a man or woman for life, have a serious import. It is not to be presumed *a priori*, that a man is sporting with such dangerous play-things as marriage engagements. Again it is said that the *animus contrahentium* must be regarded: Is that peculiar to the marriage contract? It is in the intention of the parties that the substance of every species of contract

subsists, and what is beyond or adverse to their intent does not belong to the contract. But then that intention is to be collected (primarily at least) from the words in which it is expressed; and in some systems of law, as in our own, it is pretty exclusively so to be collected. You are not to travel out of the intention expressed by the words, to substitute an intention totally different and possibly inconsistent with the words. By the matrimonial law of Scotland a latitude is allowed, which to us (if we had any right to exercise a judgment on the institutions of other countries with which they are well satisfied) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, *dehors* the instrument. This latitude is indulged in Scotland to a very great degree indeed, according to Mr. Erskine. In all other countries a solemn marriage in *facie Ecclesiæ facit fidem*; the parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man, under all the sanctions of religion and of law;---Not so in Scotland, where all this may pass, as Mr. Erskine relates, and yet the parties are at liberty to shew, that by virtue of a private understanding between themselves, all this is mere imposition and mockery, without being entitled to any

effect whatever. But be the law so, still it lies upon the party, who impeaches the intention expressed by the words, to answer two demands, which the law, I conceive, must be presumed to make upon him; first, he must assign and prove some other intention, and secondly, he must also prove that the intention so alleged by him, was fully understood by the other party to the contract, at the time it was entered into: For surely it cannot be represented as the law of any civilized country, that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention reserved in his own breast to avoid a contract which was differently understood by the party with whom he contracted. I presume, therefore, that what is said by Mr. Craigie can have no such meaning, “that if there
 “is reason to conclude, from the expressions used,
 “that both or *either* of the parties did not understand that they were truly man and wife, it
 “would enter into the question whether married
 “or not,” because this would open a door to frauds, which the justice, and humanity, and policy of all law must be anxious to keep shut. In the present case no other *animus* is set up and endeavoured to be substituted, but the *animus* of avoiding danger, on which I have already observed. The assignment of that intent does almost necessarily exclude any other, and indeed

no other is assigned; and as to any plea that it was differently understood by Miss Gordon, the other party in this cause, no such is offered, much less is any proof to that effect produced, unless it can be extracted from the letters.

Do they qualify the express contracts, and shew a different intention or understanding? It has been argued that they contain some expressions which point to apprehensions entertained by Miss Gordon that Mr. Dalrymple would resile from the obligations of the contract, and others that are intended to calm those apprehensions by promises of eternal fidelity, both which it is said are inconsistent with the supposition that they had knowingly constituted themselves husband and wife, and created obligations *de præ senti*, from which neither of them could resile. In the first place, is there this real inconsistence? Do the records of this Court furnish no such instance as that of the desertion of a wife by her husband? And is such an occurrence so entirely out of all reasonable apprehension in a case like the present? Here is a young gentleman, a soldier, likely to be removed into a country in which very different ideas of marriage prevail, amongst friends who would discountenance this connection, and amongst numerous objects which might divert his affections, and induce him to repent of the step he had taken in a season of very early youth, and in a fit of transient fondness: That

a wife left in that country exposed to the chances of a change in his affections,---to the effect of a long separation,---to the disapprobation of his friends,---to the impressions likely to be made by other objects upon a young and unsettled mind, should anticipate some degree of danger is surely not unnatural; equally natural is it, that he should endeavour to remove them by these renewed professions of constancy. But supposing that Miss Gordon really did entertain doubts with respect to the validity of her marriage, what could be the effect of such doubts? Surely not to annul the marriage, if it were otherwise unimpeached. We are, *at this moment*, enquiring with all the assistance of the learned professors of law in that country, amongst whom there is great discordance of opinion, what is the effect of such contracts. That private persons, compelled to the necessity of a secret marriage, might entertain doubts whether they had satisfied the demands of a law which has been rendered so doubtful, will not affect the real sufficiency of the measures they had taken. Mr Dalrymple might himself entertain honest doubts upon this point; but if he felt no doubt of *his own meaning*, if it was his intention to bind himself so *far as by law he could*, that is enough to sustain the contract; for it is not his uninformed opinion of law, but his real intention that is to be regarded. A *public* marriage was impracticable;

he does all that he can to effect a marriage, which was *clandestine*, not only at the time, but which was intended so to continue. The language is clear and unambiguous in the expression of intent. No other intention is assigned: and it is not such expressions as these arising naturally out of the feelings which must accompany such a transaction, that can at all affect its validity. The same observations apply to the expressions contained in the later letters written to Mr. Hawkins. In one of them she says, "My idea is, that he is not aware how binding his engagements are with me," and possibly he might not. Still if he meant at the time to contract *so far as by law he could*, no doubts which accompanied the transaction, and still less any which followed it, can at all alter its real nature and effect. Miss Gordon had likewise her later hours of doubt, and even of despondency, "you will never see me Mrs. Dalrymple," she says, in the spring of 1807, to her sister; and when it is considered what difficulties she had to encounter, at what an immense distance she then stood from the legal establishment of her claims, having lost her hold upon his affections, it cannot be matter of great surprize, if in the view of a prospect so remote and cloudy, some expression of dismay and even of despair, should occasionally betray the discomposure of her mind. As to what she observes upon the alternative suggested by some

friend, of a large sum of money in lieu of her rights (a proposition which she indignantly rejects) it seems to point rather to a corrupt purchase of her silence, than to any idea existing in her mind of a claim of damages by way of a legal *solamen* for the breach of a mere promissory contract.

The declarations, therefore, not being impeached by any of those disqualifications by which, in the law of Scotland, a contradictor is permitted to redargue and overcome the presumption arising from the production of such instruments, they become in this stage of the matter *præsumptiones juris et de jure* that found an instant conclusion of marriage, if I am right in the position that carnal copulation is not absolutely required to its completion. The fact that these papers were left in her single possession is insignificant, for it has well been observed by Dr. Burnaby, that it is not mutuality of *possession*, but mutuality of *intention*, that is requisite. It is much more natural that they should be left in the possession of the lady, she being the party whose safety is the more special object of protection, but there is no proof here, that Mr. Dalrymple himself is not possessed of a similar document. He anxiously requested to have one, and the non-production of it by him, furnishes no conclusive proof that he did not obtain his request. If he did not, it may have been an act of imprudence, that he confided the proofs of his marriage entirely to the honour of the lady; but if he did,

it is perfectly clear that she has not betrayed the trust.

But I will now suppose that this principal position is wrong: that it is either extracted from erroneous authorities, or erroneously extracted from authorities that are correct. I will proceed then to enquire what proof there is of carnal copulation having taken place between the parties; and, upon this point, I shall content myself with such evidence as the general law requires for establishing such a fact: for I find no reference to any authority to prove that the law of Scotland is more rigid in its demand, where the fact is to be established in support of a marriage, than for any other purpose. It may have happened that the fact of carnal copulation has been established by a pregnancy, or some other evidence of as satisfactory a kind, in the few cases which have been transmitted to us, but I find no such exclusive rule as that which has been ingeniously contended for by Dr. Edwards, and I take it as an incontrovertible position, that the circumstances which would be sufficient to prove intercourse in any other case would be equally sufficient in this case. I do not charge myself in so doing, with going farther than the Scotch Courts would do, and would be bound to do, attending to the established rules of evidence.

In the first place I think it is most strongly to be inferred from the paper, No. 2, that some intercourse of a conjugal nature passed between

these parties. Miss Gordon therein says, "I hereby promise that nothing but the greatest necessity, (necessity which ——— situation alone can justify,) shall ever force me to declare this marriage." Now what other possible explanation can be given of this passage, or how can it be otherwise understood than as referring to the consequences which might follow from such an intercourse? I confess that I find myself at a loss to know how the blank can be otherwise filled up, than by a supposition of consequences which would speak for themselves, and compel a disclosure.

I observe that Mr. Dalrymple denies in his allegation that any intercourse took place *after* the date of the written declarations, which leaves it still open to the possibility of intercourse *before* that time, though he certainly was not called upon to negative a preceding intercourse in consequence of any assertion in the libel which he was bound to combat. It will, I think, be proper to consider the state of mind and conduct of the parties relatively to each other at this time. Preliminary verbal declarations of mutual attachment must at least have passed (as I have already observed) before the promise contained in No. 1, was written, at whatever time that paper was written. In the first letter, which bears the postmark of the 27th of May, whether relying on this paper if it then existed, or on declarations which had verbally passed between them, he thinks

himself entitled to address her as his wife in the most endearing terms. On the following day, the 28th, the instrument which has been produced is signed, by which they mutually acknowledge each other as husband and wife. Letters continue to pass between them daily, and sometimes more than once in a day, expressive of the most ardent and eager affection on his part, which can leave no room for the slightest doubt that he was at that time most devotedly attached to her person, and desirous of the pleasures connected with the enjoyment of it, in some way or other; for to what other motive can be ascribed such a series and style of letters from a young man, writing voluntarily, without any appearance of idle pleasantry, and with every character of a sincere pursuit, whether honourable or otherwise. What was the state of mind and conduct of the lady during this period of time? It is not to be presumed, from the contents of his letters, that she was either indifferent or repulsive. The imputation indeed which has been thrown upon her is of a very different kind, that she was an acute and active female, who with a knowledge of the law of the country, which Mr. Dalrymple did not possess, was endeavouring, *quâcunque viâ datâ*, to engage him in a marriage. To this marriage she has inflexibly adhered, and now stands upon it before this Court; so that whatever might be the real state of her affections towards this gentleman, (which can be known only by her-

self) this at least must be granted, that she was most sincerely desirous of this marriage connection, which marriage connection both of them perfectly well knew could not be publicly and regularly obtained.---Taking then into consideration these dispositions of the parties, *his* desire to obtain the enjoyment of her person on the one hand, and *her* solicitude to obtain a marriage on the other, which after the delivery of such instruments she knew might at all events be effectually and honourably obtained by the mere surrender of her person, what is the probable consequence? In this part of the island the same circumstances would not induce the probability of a *private surrender*, because a *public ceremony* being here indispensibly required, no young woman acting with a regard to virtue, and character, and common prudence, would surrender her person in a way which would not only not constitute a marriage, but would in all probability defeat all expectation of such an event. In Scotland the case is very different, because in that country if there are circumstances which require the marriage to be kept secret, the woman, after such private declarations past, carries her virgin honours to the private nuptial bed with as much purity of mind and of person, with as little violation of delicacy, and with as little loss of reputation as if the matter was graced with all the sanctities of religion. It is in vain to talk of criminality, and of grossness, and of gross ideas. In such a case there

are no other ideas excited than such as belong to matrimonial intercourse. It is the "bed unde-
 " filed " according to the notions of that country:
 it is the actual *ceremony* as well as the *substance*
 of the marriage: it is the conversion of the ~~hus-~~^{lover}
~~band~~ into the ~~lover~~^{husband}: *transit in matrimonium*, if it
 was not *matrimonium* before. A most forcible
 presumption therefore arises that parties so situ-
 ated would, for the purpose of a secret marriage,
 resort to such a mode of effecting it, if opportu-
 nities offered; it must almost, I think, be pre-
 sumed, that Mr. Dalrymple was in that state of
 incapacity to enter into such a contract, which
 Lord Stair alludes to, if he took no advantage of
 such opportunities; for nothing but the want of
 opportunity can repel such a presumption.

Now how does the evidence stand with respect
 to the opportunity of effecting such a purpose?
 The connection lasted during the whole of Mr.
 Dalrymple's stay in Scotland, and was carried
 on, not only by letters couched in the most pas-
 sionate terms, but as admitted (and indeed, it
 could not be denied), by nocturnal private visits
 frequently repeated both at Edinburgh, and at
 Braid, the country-seat of Mr. Gordon, in the
 neighbourhood of that city. Upon this part of
 the case six witnesses have been examined, who
 lived as servants in the family of Mr. Gordon.
 Grizell-Lyall, whose principal business it was to
 attend on Miss Charlotte Gordon, one of the
 sisters, but who occasionally waited on Miss

Gordon, says, “ that Captain Dalrymple used to
 “ visit in Mr. Gordon’s family in the spring of
 “ 1804, that before the family left Edinburgh she
 “ admitted Captain Dalrymple into the house by
 “ the front door, by the special order of Miss
 “ Gordon, in the evenings; that Miss Gordon’s
 “ directions to her were, that when she rung her
 “ bell once, to come up to her in her bed-room,
 “ or the dressing-room off it, when she got orders to
 “ open the street door to let in Captain Dalrymple ;
 “ or when she (Miss Gordon) rung her bell twice,
 “ that she should thereupon, without coming up to
 “ her, open the street door for the same purpose ;
 “ that agreeably to these directions she frequently
 “ let Capt. Dalrymple into the house about nine,
 “ ten, or eleven o’clock at night, without his ever
 “ ringing the bell, or using the knocker; that
 “ the first time he came in this way, she shewed
 “ him up stairs to the dressing-room off the
 “ young ladies’ bed-room, where Miss Gordon
 “ then was, but that afterwards upon her open-
 “ ing the door, he went straight up stairs without
 “ speaking, or being shewn up; but how long
 “ he continued up stairs, she does not know,
 “ as she never saw him go out of the house;
 “ that the dressing room above alluded to,
 “ was on the floor above the drawing-room,
 “ and adjoining to the bed-room, where
 “ the three young ladies slept, and next to the
 “ ladies’ bed-chamber was another room, in
 “ which there was a bedstead, with a bed and

“blankets, but no curtains or sheets to the bed,
 “and it was considered as a lumber room, the
 “key of which was kept by Miss Gordon.”---She
 says that she recollects, and it is a fact, in which
 she is confirmed by another witness, Robertson,
 “that the family removed from Edinburgh to
 “Braid that year, 1804, on the evening before
 “a King’s Fast,” (the King’s Fast Day for that
 year was on the 7th of June,) “and on a Wednes-
 “day as she thinks, as the Fast Days are gene-
 “rally held on a Thursday: that at this time
 “Miss Charlotte was at North Berwick on a
 “visit to Lady Dalrymple; that Mr. Gordon
 “and Miss Mary went to Braid in the evening,
 “but Miss Gordon remained in town, as she
 “Lyll, also did, and Mr. Robertson the butler,
 “and one or two more of the servants.”---It ap-
 pears from the testimony of other witnesses, that
 Mr. Gordon her father, appeared much dissatis-
 fied that this lady did not accompany himself and
 her sister to Braid, but chose to stay in town
 upon that occasion. There are passages in
 Mr. Dalrymple’s letters which point to the ne-
 cessity of her continuance in town, as affording
 more convenient opportunities for their meeting.
 Lyll states, “that she recollects admitting Cap-
 “tain Dalrymple that evening, as she thinks,
 “sometime between ten and twelve o’clock, and he
 “went up stairs to Miss Gordon without speaking;
 “that on the next morning she went up as usual

“ to Miss Gordon’s bed-room about nine o’clock,
 “ and informed her of the hour; and having im-
 “ mediately gone down stairs, Miss Gordon rung
 “ her bell some time after, and on the Deponent
 “ going up to her, she met her either at the bed-
 “ room door, or at the top of the stairs, and de-
 “ sired her to look if the street door was locked
 “ or unlocked; and the Deponent having ex-
 “ amined, informed her that it was unlocked, and
 “ immediately after went into the dressing-room,
 “ and, after being a very short time in it, she heard
 “ the street door shut with more than ordinary
 “ force, which having attracted her notice, she
 “ opened the window of the dressing-room which
 “ is to the street, and on looking out she observed
 “ Capt. Dalrymple walking eastwards from Mr.
 “ Gordon’s house; that from this she suspected
 “ that Captain Dalrymple was the person who
 “ had gone out of the house just before; that
 “ nobody could have come in by the said door
 “ without being admitted by some person within,
 “ as the door did not open from without, and she
 “ heard of no person having been let into the
 “ house on this occasion; that having gone down
 “ stairs after this, Mr. Robertson, the butler,
 “ observed to her, *that there had been company up*
 “ *stairs last night*; but she did not mention to
 “ him any thing of her having let in Capt. Dal-
 “ rymple the night before, or of her suspicions
 “ of his having just before gone out of the house.

“ at least she is not certain, but she recollects
 “ that he desired her to remember the particular
 “ day on which this happened.”---Now from this
 account given by Lyall, the Counsel have at-
 tempted to raise a doubt, whether it was Mr.
 Dalrymple who went out, for it is said that he
 would have cautiously avoided making a noise
 for fear of exciting attention. But the account
 Lyall gives is exactly confirmed by Robertson,
 who deposes, “ that on the 7th of June, which
 “ was the King’s fast, as he was employed about
 “ ten o’clock in the morning in laying up some
 “ china in his pantry, which is immediately off
 “ the lobby, he observed Captain Dalrymple
 “ come down stairs, and passing through the
 “ lobby to the front door, unlock it, and go out and
 “ shut the door after him.” Some observations
 have been made with respect to Robertson’s con-
 duct, and he has been called a forward witness,
 because he made a memorandum of this circum-
 stance at the time it occurred; but I think his
 conduct by no means unnatural. Here was a
 circumstance of mysterious intercourse that at-
 tracted the attention of several of the servants,
 and it is not at all surprising that this man, who
 held a superior situation amongst them in Mr.
 Gordon’s family, and who appears to be an intel-
 ligent, well educated, and observing person, as
 many of the lower order of persons in that coun-
 try are, should think it right, in the zeal he felt
 for the honour of his master’s family, to make

a record of such an occurrence. In so doing, I do not think that he has done any thing more than is consistent with the character of a very honest and understanding servant, who might foresee that such a record might one day or other have its use. The witness Lyall goes on to say, “ that Miss Gordon and herself went to Braid “ that day (being the King’s Fast) before dinner, “ and that on that evening, or a night or two “ after, she was desired by Miss Gordon to open “ the window of the breakfasting parlour to let “ Captain Dalrymple in, and she did so accord- “ ingly, and found Captain Dalrymple at the “ outside of the window when she came to open “ it, and this she thinks might be between ten “ and twelve o’clock, and she shewed him up “ stairs, when they were met by Miss Gordon “ at the door of her bed-chamber, when they “ two went into said chamber, and she return- “ ed down stairs; that she does not know how “ long Captain Dalrymple remained there with “ Miss Gordon, or when he went away;” she states that “ Miss Charlotte returned from her “ visit at North Berwick a few days after Miss “ Gordon and the deponent went to Braid; that “ at Braid Miss Gordon and Miss Charlotte slept “ in one room, and Miss Mary in another; that “ within Miss Gordon and Miss Charlotte’s bed- “ chamber there was a dressing-room, the key of “ which Miss Gordon kept; and she recollects “ one day getting the key of it from Miss Gor-

“ don to bring her a muff and tippet out of it, and
 “ upon going in she was surprised to find in it a
 “ feather-bed lying upon the floor, without either
 “ blankets or sheets upon it, so far as she recol-
 “ lects: that it struck her the more, as she had
 “ frequently been in that room before without
 “ seeing any bed in it; and, as Miss Gordon kept
 “ the key, she imagined she must have put it there
 “ herself; that she found this bed had been taken
 “ from the bed-chamber in which Miss Mary
 “ slept, it being a double bedded room; that when
 “ she observed the said bed in the dressing-room,
 “ it was during the time that Captain Dalrymple
 “ was paying his evening visits at Braid; that
 “ upon none of the occasions that she let Captain
 “ Dalrymple into Braid House did she see him
 “ leave it, nor did she know when he departed.”

Three other witnesses, Robertson and the two
 gardeners, have been examined upon this part of
 the case, and they all prove that Mr. Dalrymple
 was seen going into the house in the night, or
 coming out of it in the morning. It is proved
 likewise that Porteous, one of the servants, was
 alarmed very much that the window of the room
 where he kept his plate, was found open in the morn-
 ing, and that it must have been opened by some-
 body on the inside; It is proved that nothing was
 missing, not an article of plate was touched, and
 that Mr. Dalrymple was seen by the two garden-
 ers very early in the morning, coming away from
 the house, and in the vicinity of the house, going

towards Edindurgh; and as to what was suggested that he might have been in the out-houses all night, I think it is not a very natural presumption, that a gentleman who was privately and habitually admitted into the house at such late hours as eleven or twelve o'clock at night, would have been ejected afterwards for the purpose of having so uncomfortable a situation for repose, as the gentlemen suppose, in some of the stables or hovels belonging to the house.---There is another witness of the name of Brown, Mr. Dalrymple's own servant, whose evidence is strongly corroborative of the nature of those visits. This man is produced as a witness by Mr. Dalrymple himself, and he states that he was in the habit of privately conveying notes from his master to Miss Gordon, which were to be concealed from her father.---He says to the second interrogatory, "that he often accompanied his master to Mr. Gordon's house at Edinburgh, but he cannot set forth the days upon which it was he so attended him there, except that it was between the 10th of May, and the 18th of July, 1804," subsequently therefore to the execution of the last paper; This witness further states, "that *on the night of the 18th of July*, which was the last time Mr. Dalrymple was in or near Edinburgh in the said year 1804, he, by the orders of his master, waited with the curricule at the house of Charles Gordon, Esq. till about twelve o'clock, when Mr. Dalrymple came out of the said

“ house, and got into the curricie, and rode
 “ away therein about a mile on the road to-
 “ wards Edinburgh, and then desired him to stop,
 “ and having told him to go and put up his horses
 “ in Edinburgh, and to meet him again on the same
 “ spot at six o'clock the next morning with the
 “ curricie, Mr. Dalrymple then got out, and
 “ walked back towards the said Mr. Gordon's
 “ house, and on the next morning at six o'clock he
 “ met his master at the appointed spot, and brought
 “ him in his said curricie to Haddington, from
 “ whence he went in a chaise to the house of a
 “ Mr. Nisbet, in the neighbourhood of that town,
 “ where Mr. Dalrymple's Father was then staying;
 “ that *he does believe that Mr. Dalrymple did, on*
 “ *the night of the said 18th of July, go back to,*
 “ *and remain in the said Mr. Gordon's country-*
 “ *house:*” and I think it is impossible for any
 body who has seen this man's evidence, and the
 evidence of the other witnesses, not to suppose
 that he did go there, and did take his repose for
 the night in that house. Now it is said, and truly
 said, in this case, that the witness Lyall, upon her
 cross examination, says “she does not think that
 “ they could have been in bed together, so far as
 “ she could judge;” what means she took to form
 her judgment does not appear; the view taken
 by her might be very cursory: she is an unmar-
 ried woman, and might be mistaken with respect
 to appearances, or the appearances might be cal-
 culated for the purposes of deception, in a con-

nection which was intended to be, to a great degree, secret and clandestine. But the question is not what inference Lyall draws, but what inference the Court ought to draw from the fact proved by her evidence, that Mr. Dalrymple passed the whole of the night in Miss Gordon's room under all the circumstances described, with passions, motives, and opportunities all concurring between persons connected by ties of so sacred a nature. Lady Johnstone, one of her sisters, has been relied upon as a strong witness to negative any sexual intercourse; and I confess it does appear to me rather an extraordinary thing, that that lady's observations and surmises should have stopped short where they did, considering the circumstances which might naturally have led her to observe more and to suspect more: she certainly was kept in the dark, or at least in a twilight state. It rather appears from the letters, that there were some quarrels and disagreements between Mr. Dalrymple and the gentleman who afterwards married this lady, and who was then paying his addresses to her; How far that might occasion concealment from her I cannot say. The father, for reasons of propriety and delicacy respecting himself and family, was to be kept in ignorance, and therefore it might be proper that only half a revelation should be made to the sister. She certainly states that upon her return to Braid, in the middle of June,

she slept with her sister; and never missed her from her bed, and never heard any noise in the sister's dressing-room; which led her to suppose that Mr. Dalrymple was there. I am far from saying that this evidence of Lady Johnstone's is without weight: In truth; it is the strongest adverse evidence that is produced on this point: But she admits, "that from what she had herself
 "observed she had no doubt, but that Mr. Dal-
 "rymple had made his addresses to her sister in
 "the way of marriage; that when the deponent
 "used to ask her said sister about it, she used to
 "laugh it off:" From which it appears that Miss Gordon did not communicate freely with her upon the subject. She says, "that never till
 "after the proceedings in this cause had com-
 "menced had she heard that they had exchanged
 "written acknowledgments of their being lawful
 "husband and wife; and had consummated their
 "marriage; but, on the contrary, always, till
 "very lately, conceived that they had merely en-
 "tered into a written promise with each other;
 "so as to have a tie upon each other, that neither
 "of them should marry another person without
 "the consent of the other of them." That is the interpretation this lady gives to the paper No. 10, though that paper purports a great deal more, and she says, "that although she did suspect that
 "Mr. Dalrymple had at some time or times been
 "in her sister's dressing-room, yet she never did
 "imagine that they had consummated a marriage

“between them.” But since it is clearly proved by the other witnesses that Mr. Dalrymple was in the habit of going privately to Miss Gordon’s bed-room at night, and going out clandestinely in the morning, I cannot think that the ignorance of this witness respecting a circumstance with regard to which she was to be kept in ignorance, can at all invalidate the facts spoken to by the other witnesses, or the conclusion that ought to be deduced from them.

With respect to the letters written at such a time as this, I am not disposed to scan with severe criticism the love-letters of a very young gentleman, but they certainly abound with expressions which, connected with all the circumstances I have adverted to, cannot be interpreted otherwise than as referring to such an intercourse. I exclude all grossness, because, considered as a conjugal intercourse, it carries with it no mixture of grossness but what may be pardonable in a very young man, alluding to the raptures of his honey-moon, when addressing the partner of his stolen pleasures. I will state some passages, however, which appear to point at circumstances of this nature:---“My dearest sweet wife---You
 “are, I dare say, happy at Queen’s Ferry, while
 “your poor husband is in this most horrible place,
 “tired to death, *thinking only on what he felt*
 “*last night, for the height of human happiness*
 “*was his.*” It is said that this has reference only to the happiness which he enjoyed in her

society, for an expression immediately follows, in which he extols the happiness of being in the society of the person beloved: and it may be so, but it must mean society in a qualified sense of the word, *private* and *clandestine* society; society which commenced at the hour of midnight, and which he did not quit till an early hour (and then secretly) in the morning. That *society* is meant only in the tamest sense of the word, is an interpretation which I think cannot very well be given to such expressions as these, used upon such an occasion. In the letter marked No. 6, he says, "Put off the journey to Braid, if possible, till "next week, as the town suits so much better for "all parties. I must consult L. on that point "to-morrow, as I well know how a-propos plans "come into her pretty head; there appears to "me only one difficulty, which is where to meet, "as there is only one room, but we must obviate "that if possible." In the next letter, No. 7, he says, "But I will be with you at eleven to-morrow "night; meet me as usual.---P. S. Arrange every "thing with L. about the other room." There are several other expressions contained in these letters which manifestly point to the fact of sexual intercourse passing between them. These I am unwilling to dwell upon with any particular detail of observation, because they have been already stated in the arguments of counsel, and are of a nature that does not incline me to repeat them without absolute necessity; I refer to the

letters themselves, particularly to No. 4, and No. 6. But it is said, here are passages in these letters which show that no such intercourse could have passed between them; one in particular in No. 4, is much dwelt upon, in which he says, "Have you forgiven me for what I attempted last night; believe me the thought of your cutting me has made me very unhappy." From which it is inferred that he had made an attempt to consummate his marriage, and had been repulsed. Now this expression is certainly very capable of other interpretations: It might allude to an attempt made by him to repeat his pleasures improperly, or at a time when personal or other circumstances might have rendered it unseasonable. In the very same letter he exacts it as *a right*. He says, "You will pardon it; although it was my right, yet I make a determination not too often to exert it; what a night shall I pass without any of those heavenly comforts I so sweetly experienced yesterday." In a correspondence of this kind, passing between parties of this description, and alluding to very private transactions, some degree of obscurity must be expected. Here is a young man heated with passion, writing every day, and frequently twice in a day, making allusions to what passed in secrecy between himself and the lady of his affections; Surely it cannot be matter of astonishment, that many passages are to be found difficult of exact interpretation, and which it is impossible for any but the parties themselves fully

to explain. What attempt was made does not appear; This I think does most distinctly appear, that he did at this time insist upon his rights, and upon enjoying those privileges which he considered to be legally his own. Wherever these obscure and ill-understood expressions occur, they must be received with such explanations as will render them consistent with the main body and substance of the whole case. Another passage in the letter No. 5, which is dated on the 30th of May, has been relied upon as shewing that Mr. Dalrymple did not consider himself married at that time. In that letter he says, "I am truly wretched, I know not what I write, "how can you use me so? but (*on Sunday, on my soul**) you shall, you must become my wife, it is my right," and therefore it is argued that she had not yet become his wife. The only interpretation I can assign to this passage, which appears to have been written when he was in a state of great agitation, is, that on Sunday she was to submit to what he had described as the rights of a husband. It is not to be understood that a public marriage was to be executed between them on that day, because it is clear from the whole course and nature of the transaction, that no such ceremony was ever intended: It appears from all the facts of the case, that it was to be a private marriage, that it was so to continue,

* *Torq.*

and therefore no celebration could have been intended, to take place on that approaching Sunday.

In a case so important to the parties, and relating to transactions of a nature so secret, I have ventured to exercise a right not possessed by the advocates, of looking into the sworn answers of the parties upon this point: and I find Miss Gordon swears positively that intercourse frequently passed between them subsequently to the written declaration or acknowledgment of marriage. Mr. Dalrymple swears as confidently that it did not so take place, but he admits that it did on some one night of the month of May, prior to the signature of the paper marked No. 1; the date of which, however, he does not assign, any more than he does that of the night in which this intercourse did take place. Now consider the effects of this admission. It certainly does often happen that men are sated by enjoyment; that they relinquish with indifference, upon possession, pleasures which they have eagerly pursued: But it is a thing quite incredible that a man so sated and cloyed should afterwards bind himself by voluntary engagements, to the very same party who had worn out his attachment. Not less inconsistent is this supposition with the other actual evidence in the case, for all these letters, breathing all these ardors, are of a subsequent date, and prove that these sentiments clung to his heart as closely and as warmly as ever during the whole

continuance of his residence in Scotland. I ask if it is to be understood, that with such feelings he would relinquish the pleasures which he had been admitted to enjoy, and which he appears to value so highly, or that she would deny him those pleasures for the consolidation of her marriage, which she had allowed him, according to his own account, gratuitously and without any such inducement.

On this part of the case I feel firm. It is not a point of foreign law on which it becomes me to be diffident; It is a matter of fact examinable upon common principles, and I think I should act in opposition to all moral probabilities, to all natural operations of human passions and actions, and to all the fair result of the evidence, if I did not hold that consummation was fully proved. If this is proved, then is there, according to the common consent of all legal speculation on the subject, an end of all doubt in the case, unless something has since occurred to deprive the party of the benefit of a judicial declaration of her marriage.

What has happened that can have such an effect? Certainly the mere fact of a second marriage, however regular, can have no such effect. The first marriage, if it be a marriage upheld by the law of the country, can have no competitor in any second marriage, which can by legal possibility take place; for there can be no second marriage of living parties in any country which disallows polygamy. There may be a ceremony,

but there can be no second marriage---it is a mere nullity.

It is said that by the law of Scotland, if the wife of the first private marriage chooses to lie by, and to suffer another woman to be trepanned into a marriage with her husband, she may be barred *personali exceptione* from asserting her own marriage. Certainly no such principle ever found its way into the law of England; no connivance would affect the validity of her own marriage; even an active concurrence on her part in seducing an innocent woman into a fraudulent marriage with her own husband, though it might possibly subject her to punishment for a criminal conspiracy, would have no such effect. But it is proper that I should attend to the rule of the law of Scotland upon this subject. There is no proof, I think, upon the exhibition of Scotch law, which has been furnished to the Court, that such a principle was ever admitted authoritatively; for though in the gross case of Campbell versus Cochrane, in the year 1747, the Court of Session did hold this doctrine, yet it was afterwards retracted and abandoned on the part of the second wife, before the House of Lords, which most assuredly it would not have been, if any hope had been entertained of upholding it as the genuine law of Scotland, because the second wife could never have been advised to consent to the admission of evidence which very nearly overthrew the rights of her own marriage. Under

the correct application of the principles of that law, I conceive the doctrine of a *medium impedimentum* to be no other than this, that on the *factum* of a marriage, questioned upon the ground of the want of a serious purpose and mutual understanding between the parties, or indeed on any other ground, it is a most important circumstance, in opposition to the real existence of such serious purpose and understanding, or of the existence of a marriage, that the wife did not assert her rights, when called upon so to do, but suffered them to be transferred to another woman, without any reclamation on her part. This doctrine of the effect of a mid-impediment in such a case, is consonant to reason and justice, and to the fair representations of Scotch law given by the learned advocates, particularly by Mr. Cay in his answer to the third additional interrogatory, and Mr. Hamilton in his answer to the first further additional interrogatory; but surely no conduct on the part of the wife, however criminal in this respect, can have the effect of shaking *ab initio* an undoubted marriage.

Suppose, however, the law to be otherwise, how is it applicable to the conduct of the party in the present case? Here is a marriage, which at the earnest request of this gentleman, and on account of his most important interests (in which interests her own were as seriously involved) was not only to be secret at the time of contracting, but was to remain a profound secret till he should

think proper to make a disclosure; it is a marriage in which she has stood firm in every way consistent with that obligation of secrecy, not only during the whole of his stay in Scotland, but ever since, even up to the present moment. She corresponded with him as her husband till he left England, not disclosing her marriage even to her own family on account of his injunctions of secrecy. Just before he quitted this country, he renewed in his letters those injunctions, but pointed out to her a mode of communicating with him by letter, through the assistance of Sir Rupert George, the first Commissioner of the Transport Board. In the same letter written on the eve of his departure for the Continent, he cautions her against giving any belief "to a variety of reports which might be circulated about him during his absence, for if she did, they would make her eternally miserable. I shall not explain," he says "to what I am alluding, but I know things have been said, and the moment I am gone will be repeated, which have no foundation whatever, and are only meant for the ruin of us both; once more, therefore I entreat you, if you value your peace or happiness, believe no report about me whatever." No doubt I think, can be entertained, that the reports to which he in this mysterious language adverts, must respect some matrimonial connections, which had become the subjects of public gossip, and might reach her ear. Nothing how-

ever, less than certain knowledge was to satisfy her according to his own injunction, and nothing could, I think, be more calculated to lull all suspicion asleep on her part. It appears, however, that it had not that complete effect, for Mr. Hawkins says, that upon the return of Mr. Dalrymple, in the month of August, 1806, when he came to England privately without the knowledge of his father, or of this lady, he then, for the first time “communicated to him many circumstances respecting a connection he stated “he had had with a Miss Johanna Gordon at “Edinburgh, and expressed his fears that she “would be writing and troubling his father upon “that subject as well as tormenting him the said “John William Henry Dalrymple with letters, “to avoid which, he begged him not to forward “any of her letters to him who was then about to “go to the Continent, and in order to enable him “to know her hand-writing, and to distinguish “her letters from any others, he then cut off the “superscription from one of her letters to him, “which he then gave to the deponent for that “purpose, and at the same time swore, that if “he did forward any of her letters, he never “would read them ; and he also desired and entreated him to prevent any of Miss Gordon’s “letters from falling into the hands of General “Dalrymple, and that he went off again to the “Continent in the month of September.” Mr. Hawkins further says, “that he did find means “to prevent several of Miss Gordon’s letters ad-

“ dressed to General Dalrymple, from being re-
 “ ceived by him, but having found considerable
 “ risque and difficulty therein, and in order to put
 “ a stop to her writing any more letters to General
 “ Dalrymple, he the deponent did himself write
 “ and address a letter to her at Edinburgh, wherein
 “ he stated that the letters which she had sent to
 “ General Dalrymple had fallen into his hands to
 “ peruse or to answer, as the General was himself
 “ precluded from taking any notice of letters from
 “ the precarious state he was in, or to that effect,
 “ and urged the propriety of her desisting from
 “ sending any more letters to General Dalrymple;
 “ and the deponent having, in his said letter,
 “ mentioned that he was in the confidence of, and
 “ in correspondence with Mr. Dalrymple, she soon
 “ afterwards commenced a correspondence with
 “ him respecting Mr. Dalrymple, and also sent
 “ many letters, addressed to Mr. Dalrymple, to
 “ him, in order to get them forwarded; but the
 “ Deponent having been particularly desired by
 “ Mr. Dalrymple not to forward any such letters to
 “ him, did not send all, but thinks he did send
 “ one or two, in consequence of her continued
 “ importunities;” he says, “ that it was some
 “ time in the latter end of the year 1806, or the
 “ beginning of the year 1807, that the correspon-
 “ dence between Miss Gordon and himself first
 “ commenced; and that after the death of Gene-
 “ ral Dalrymple, which he believes happened in
 “ or about the spring of the year 1807, she, in her
 “ correspondence with him, expressly asserted

“and declared to him her marriage with Mr. Dalrymple.” It appears then that Miss Gordon knew nothing of Mr. Hawkins, except from the account he had given of himself, that he was the confidential agent of Mr. Dalrymple, and therefore she might naturally have felt some hesitation about laying the whole of her case before him, especially as General Dalrymple was alive, till whose death the marriage was to remain a profound secret; but upon that event taking place, which happened at no great distance of time, Miss Gordon instantly asserted to Mr. Hawkins her marriage with Mr. Dalrymple, and he, wishing to be furnished with the particulars, wrote to her for the purpose of obtaining them, which she thereupon communicated, and at the same time sent him a copy of the original papers, which in the language of the law of Scotland, she called her *marriage lines*.---She mentioned likewise some bills which had been left unpaid by her asserted husband, upon which he wrote to Mr. Dalrymple, and he says, “that he has no doubt Mr. Dalrymple received the letters, because he replied thereto from Berlin or Vienna, and caused the bills to be regularly discharged.” He says, “that in the latter end of May, in the year 1808, Mr. Dalrymple returned again to England.”---I ought to have mentioned that it appears clearly, that Miss Gordon had been sending letters to Mr. Hawkins, expressive of her uneasiness on account of the reports which had prevailed of a marriage about to be entered

into by Mr. Dalrymple. She says, in a letter to Mr. Hawkins, "I shall have no hesitation
 "in putting my papers into the hands of a man
 "of business, and establishing my rights, as it is
 "a very unpleasant thing to hear different reports
 "every day; the last one is, that Mr. Dalrymple
 "had ordered a new carriage on his marriage
 "with a nobleman's daughter." This description
 cannot apply to the marriage which has since
 taken place with Miss Manners, but is merely some
 vague report which it seems had got into common
 discourse and circulation. On the 9th of May,
 she writes to know whether any accounts had
 been received from Mr. Dalrymple, and says,
 "Any real friend of Mr. Dalrymple's ought to
 "caution him against forming any new engage-
 "ment;" and she protests most strongly against
 his entering into a matrimonial connection with
 another woman.---In the end of that very month
 of May, Mr. Dalrymple came home, having
 been at different places on the continent; he
 went down to Mr. Hawkins's house at Findon,
 where having met him, they conversed together
 upon Mr. Dalrymple's affairs, and particularly
 upon his marriage with Miss Gordon, and on
 that occasion, Mr. Hawkins having at this time
 no doubt left upon his mind of the marriage, and
 fearing from the manner and conduct of Mr. Dal-
 rymple, that he had it in contemplation to marry
 Miss Manners, the sister of the Duchess of St.
 Alban's, he cautioned him in the most anxious
 manner against taking such a step, and in the

strongest language which he was able to express, described the mischiefs which would result from such a measure, both to himself and the Lady, and the difficulties in which their respective families might be involved, owing to Mr. Dalrymple's previous marriage. Mr. Hawkins thought at the time that those admonitions had had the good effect of deterring him from the intention of marrying Miss Manners, though he mentions a circumstance which bears a very different complexion, viz. that Mr. Dalrymple took from him almost by force, some of Miss Gordon's letters, and particularly those annexed to the allegation. He says, "that Mr. Dalrymple took them under "pretence of shewing them to Lord Stair, and "seemed by his manner and expressions to consider that he had thereby possessed himself of "the means of shewing that Johanna Dalrymple "was not his wife." It was about the end of the month of May, that Mr. Hawkins and Mr. Dalrymple held this conversation at Findon, and upon the 2d of the following month, Mr. Dalrymple was married to Miss Manners, before it was possible that Miss Gordon could know the fact of his arrival in England. Upon her knowledge of the marriage, she immediately proceeds to call in the aid of the law.---I profess I do not see what a woman could with propriety have done more to establish her marriage rights; Mr. Dalrymple was all the time abroad, and the place of his residence perfectly unknown to her; no

process could operate upon him from the Courts, either of Scotland or England, nor was he amenable in any manner whatever to the laws of either country: She did all she could do under the obligations of secrecy; which he had imposed upon her, by entering her private protest against his forming any new connection; she appears to me to have satisfied the whole demands of that duty, which such circumstances imposed upon her; and I must say, that if an innocent Lady has been betrayed into a marriage, which conveys to her neither the character nor rights of a wife, I cannot upon any evidence which has been produced, think that the conduct of Miss Gordon is chargeable, either legally or morally, with having contributed to so disastrous an event.

Little now remains for me but to pronounce the formal sentence of the Court, and it is impossible to conceal from my own observation the distress which that sentence may eventually inflict upon one, or perhaps more individuals, but the Court must discharge its public duty; however painful to the feelings of others, and possibly to its own; and I think I discharge that duty in pronouncing, that Miss Gordon is the legal wife of John William Henry Dalrymple Esq. and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this Court that he has so done; by the first Session of the next Term.

END OF THE JUDGMENT.

APPENDIX,

CONTAINING

THE DEPOSITIONS OF THE WITNESSES EXAMINED,
AND THE EXHIBITS PRODUCED,

IN

THE CAUSE,

&c. &c.



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THE
Depositions of Witnesses,

EXAMINED ON THE

LIBEL AND EXHIBITS,

GIVEN ON BEHALF OF

MRS. DALRYMPLE.

28th March, 1809.

DAME CHARLOTTE JOHNSTONE, Wife of
Sir John Lowther Johnstone, of Portman Square,
in the County of Middlesex, Baronet, aged twenty-
six years, a Witness produced and sworn.

1. **TO** the first article of the said Libel the Deponent saith,
that she is the sister of Johanna Dalrymple, formerly Gordon,
Party in this Cause, and that in or about the month of
March, in the year 1804, whilst the Deponent and her said
sister were living with their father Charles Gordon, Esq.
at his house in St. Andrew's Square, in the City of Edinburgh,
in Scotland, an acquaintance commenced between the
articulate John William Henry Dalrymple, Esq. Party in
this Cause, (who was then a Lieutenant in his Majesty's
Fifth Regiment of Dragoon Guards, stationed at Piershill
Barracks, near the said City of Edinburgh, in Scotland,) and
the Deponent's said sister, by the said John William Henry
Dalrymple visiting at the house of their said father, Charles

Gordon, Esq. and when such their acquaintance commenced, the said Johanna Dalrymple, then Gordon, was a Spinster, upwards of twenty-one years of age, and, as the Deponent believes, was free from all matrimonial contracts and engagements; and he, the said John William Henry Dalrymple was a Bachelor, aged about nineteen years, and for aught the Deponent knows to the contrary, he was also free from all matrimonial contracts and engagements; and a short time after the acquaintance of the said parties commenced they became extremely familiar and intimate, and there appeared to be a great flirtation between them, insomuch that the Deponent had no doubt but that the said John William Henry Dalrymple had made his addresses to the said Johanna Dalrymple, then Gordon, in the way of marriage, but the Deponent was kept in ignorance, by her said sister, of her having accepted such the courtship and addresses of the said John William Henry Dalrymple for some time, and when the Deponent used to ask her said sister as to her intentions in respect to her becoming the wife of the said John William Henry Dalrymple, she used to laugh it off, and never give the Deponent a direct answer thereto. And the Deponent further saith, that though, in the month of May, in the said year 1804, she did not doubt from the flirtation that was kept up between the said John William Henry Dalrymple and the said Johanna Dalrymple, then Gordon, (and which she saith was carried on secretly and unknown to their respective fathers,) that they had a Tie upon each other from some promise entered into by them, so that neither of the parties could marry any other person without each other's permission: Yet the Deponent had no knowledge of the said Parties in this Cause having respectively signed and exchanged a written Promise of Marriage with each other at that time. And she further saith, that in the last week of the said month of May, 1804, she went from her said father's house in St. Andrew's Square, Edinburgh, where she left her sister Johanna Dalrymple, then Gordon, and the rest of the family, to go on a visit at North Berwick, and did not return therefrom till about the middle of the month

of June following, when she found the said family, and, amongst them, her said sister Johanna Dalrymple, Party in this Cause, at her said father's country seat at Braid, about three miles from Edinburgh; and the Deponent therefore knew nothing of what passed between the said John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, his wife, during the time she, the Deponent, was so as aforesaid absent on such visit, for the said Johanna Dalrymple did not make the Deponent her confidante. And the Deponent also further saith, that she and her said sister Johanna Dalrymple, formerly Gordon, used to sleep together in their said father's house; and that in the house at Braid aforesaid there was a dressing-room which was solely used by the said Johanna Dalrymple, formerly Gordon, (the way to which was through their said bed room,) and there was another dressing-room which was always used by the Deponent; and in the latter end of the month of June, and beginning of the month of July, in the said year 1804, the Deponent, from having heard it reported that the said John William Henry Dalrymple had been known to go late at night to the Deponent's said father's house at Braid, and had been seen coming therefrom early in a morning, was, on talking to her said sister Johanna Dalrymple, formerly Gordon, on that subject, led to suspect that, from what her said sister said at the time, that she had sometimes concealed the said John William Henry Dalrymple in her said dressing-room, but the Deponent never saw or heard him either go into, or come out of, the said dressing-room, and never heard any noise therein which led her to suppose he was there, and never actually knew of his being therein; neither did she ever miss the said Johanna Dalrymple, formerly Gordon, from her bed during the time she was in the habit of sleeping with the Deponent; and although the Deponent did nevertheless suspect that the said John William Henry Dalrymple had at some time, or times, (though she knew not when,) been in her said sister's dressing-room, yet the Deponent never did imagine that they had consummated a marriage between them in the said house, or at any other

place, nor did the Deponent know or consider that they the said John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, had exchanged acknowledgments in writing of their being lawful husband and wife, or had contracted or bound themselves to each other according to the laws, usages, and customs of the kingdom of Scotland in respect to marriages, for the Deponent never, till after the proceedings in this Cause had commenced, knew or heard that they the said Parties in this Cause had exchanged written acknowledgments of their being lawful husband and wife, and had consummated their marriage, but, on the contrary always, till very lately, conceived that they the said Parties in this Cause had merely entered into a written promise with each other so as to have a Tie upon each other that neither of them should marry another person without the consent of the other of them; and although the Deponent did very frequently (after she understood the said Parties had entered into such written promise with each other) in her letters to her said sister address her as Mrs. Dalrymple, and did also prior thereto call the said John William Henry Dalrymple "Brother Dal.;" yet she saith she only did so jocularly, and not from a belief at that time of their being husband and wife; and even so late only as last January was twelvemonth, when the Deponent was in Scotland, and her sister, the said Johanna Dalrymple, was on a visit to her at Balincereiff, near Edinburgh, the Deponent, in conversation with her said sister, took occasion to ask her when she meant to become Mrs. Dalrymple? to which she answered, "You shall never see me Mrs. Dalrymple:" or to that effect. And the Deponent lastly saith, that the aforesaid acknowledgment, or contract of marriage, so entered into and exchanged between them the said Parties in this Cause, was kept a secret by them, and they never appeared familiar with each other but when they were not in company, for when they were in company at the Deponent's said father's house the same distance was observed by the said John William Henry Dalrymple towards the said Johanna Dalrymple, formerly Gordon, as towards the Deponent, or any other

person; and they were not, to the Deponent's knowledge generally known as to be or considered lawful husband and wife, nor does she ever recollect to have heard the said Johanna Dalrymple, formerly Gordon, at any time call him, the said John William Henry Dalrymple, her husband, or acknowledge him as such; but she thinks, and is pretty certain, she hath heard him call her said sister his wife frequently; and further to the said article she cannot depose.

2. To the second Article of the said Libel, and to the Paper-writings marked No. 1 and No. 2, therein particularly pleaded and referred to, the Deponent saith that she of course was accustomed to see her said sister Johanna Dalrymple very frequently write and subscribe her name in the course of the number of years they lived together, and thereby the Deponent became well acquainted with her said sister's manner and character of hand-writing and subscription, but she does not remember ever to have seen the said John William Henry Dalrymple write, though she saith she acquired a good knowledge of his manner and character of hand-writing from having often, during the said year 1804, received notes from him, and seen letters which she hath known to have come from him. And the Deponent having now carefully viewed the said two Exhibits, marked No. 1 and No. 2, pleaded and referred to in the said second Article, and now produced and shewn to her, she saith that she verily believes the words "& I promise the same," written in the said Exhibit, marked No. 1, and the superscription "J. Gordon," thereto set and subscribed were and are of the proper hand-writing and subscription of her said sister Johanna Dalrymple, then Johanna Gordon, spinster, and from the knowledge she had as aforesaid acquired of the hand-writing and subscription of the said John William Henry Dalrymple, Party in this Cause, she is of opinion and believes that the rest of the said Paper-writing, marked No. 1, and the name "J. Dalrymple," thereto set and subscribed are of the proper hand-writing and subscription of the said John William Henry Dalrymple, Party in this

Cause, from the great similarity she observes in such writing and signature to his the said John William Henry Dalrymple's hand-writing ; but she cannot take upon herself to say of whose hand-writing the endorsement, " a sacred promise " is. And the Deponent having carefully viewed and perused the said Paper-Writing, marked No. 2, she saith that she is not quite so certain whether the name " J. Gordon," thereto set and subscribed, is of the hand-writing of the said Johanna Dalrymple, formerly Gordon, or whether any part of the said Paper-Writing is of her said sister's hand-writing, though the said signature bears some resemblance to her manner and character of subscription ; neither can she with any degree of certainty say whether any part of the said Exhibit, marked No. 2, is of the hand-writing of the said John William Henry Dalrymple, Party in this Cause, though she thinks that the two first lines thereof, and the date and subscription thereto, " May 28th, 1804," " J. Dalrymple," bear a very strong resemblance to his manner and character of hand-writing and subscription ; but she hath not the least doubt, and does verily believe that J. Dalrymple and J. Gordon, who appear to be Parties to the said two Exhibits, marked No. 1 and No. 2, and John William Henry Dalrymple, and Johanna Dalrymple, his wife, formerly Johanna Gordon, spinster, the sister of the Deponent, and the Parties in this Cause, were and are the same persons, and not divers : and further to the said article she cannot depose.

3. To the third article of the said Libel the Deponent saith, that the marriage pleaded in the first article of the said Libel on which she is examined, to have been entered into between the said John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, Parties in this Cause, was so entered into as she is certain, and also (if consummated) was so consummated without the knowledge or privity of their respective parents, for it was kept wholly a secret from both families that such a marriage had been entered into, and further to said article she cannot depose, save that the said Johanna Dalrymple, formerly Gordon, continued

and resided at the house of Charles Gordon, Esq. her father, and passed under her maiden name of Gordon, till the proceedings in this Cause were commenced: and further she cannot depose.

4. To the fourth article of the said Libel the Deponent saith, that she well remembers the said John William Henry Dalrymple went to join his regiment at Dunbar in Scotland, soon after or about the time the marriage in question in this Cause is pleaded to have been entered into between the parties therein, after which time the Deponent had reason to suspect that a correspondence was kept up between them, the said parties in this Cause; but her said sister being very secret with the Deponent, in respect thereto she cannot further depose to the said article.

5. To the fifth article of the said Libel, and to the several exhibits therein pleaded and referred to, the Deponent knows not to depose.

6. To the sixth article of the said Libel the Deponent saith, she knows not to depose save that one day happening as she believes, sometime about the time pleaded, (though she can by no means remember the time or place, when or where the circumstance now about to be deposed of by her took place) she, the Deponent, being with her sister the said Johanna Dalrymple, formerly Gordon, alone (whom the Deponent did not then consider as married) a paper-writing was produced by her said sister, who read the same, to the Deponent, by which the Deponent understood that the said John William Henry Dalrymple, and the Deponent's said sister, had entered into such an engagement that they had a Tie upon each other, so that neither of them could marry any other person without the consent of the other of them: but the Deponent did not consider from what she heard read as aforesaid, that it was an acknowledgment or declaration of a marriage between them the said Parties in this Cause: and she further saith that at the time now deposed of, her said sister, Johanna Dalrymple, Party in this Cause, told the Deponent that she wished her to be a witness to what Mr. Dalrymple had written (meaning the paper writing which she had just then read to the Deponent) and asked

the Deponent if she had any objection to sign such paper as a witness; to which the Deponent replied that she had not the least objection to do so if it could be of any service to her and her said sister, saying, she wished the Deponent to sign it to keep him (meaning the said John William Henry Dalrymple, Party in this Cause) to his word; the Deponent thereupon replied, that if he required that to keep him to his word he was not worth having: but the said Johanna Dalrymple continuing to urge the Deponent to sign such paper-writing as a witness, and saying it would be doing her a favour to sign the same as a witness, she, the Deponent, accordingly did so, although she did not see the same written or signed together by either of the parties therein mentioned: and further she cannot depose.

7. To the seventh article of the said Libel and to the Paper Writings or Exhibits, marked No. 10, and No. 11, to the said Libel annexed, and in the said seventh article, particularly pleaded and referred to, the same having been now produced and shewn to and carefully viewed and perused by the Deponent, she saith that the name and word "Witness, Charlotte Gordon," appearing subscribed and written at the bottom of the said Exhibit, marked No. 10, is of her the Deponent's own proper hand-writing and subscription, and she knows the same thereby to be the very same Paper writing by her deposed of in her deposition to the sixth article of the said Libel, which paper-writing, except what the Deponent so as aforesaid wrote thereon, she supposes and believes is all of the proper hand-writing of the said John William Henry Dalrymple, Party in this Cause; but she cannot take upon herself to say of whose hand-writing the said Exhibit, No. 11 is. And she lastly saith, that she hath not a doubt, but does verily believe that John William Henry Dalrymple and Johanna Gordon, who appear to have been Parties to the said Exhibit, marked No. 10; and John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, his wife, the Parties in this Cause were and are the same persons, and not divers: and further she cannot depose.

8. To the eighth article of the said Libel the Deponent

saith, that she remembers the said John William Henry Dalrymple left Scotland with his father, General William Dalrymple, in the month of July, in the said year 1804, or thereabouts, and came to England, and continued to live and reside there till about the month of July, 1805, when he went to Malta; and the Deponent having, in the month of January, in the said year 1805, married her present husband, came also to live in England, and in the course of the time between her so coming to live in England and the said month of July, when the said John William Henry Dalrymple went to Malta, she saw him once or twice in her own house, but she hath no knowledge of his having written the letters mentioned and alluded to in the said article to her the Deponent's said sister, Johanna Dalrymple, formerly Gordon: and further to the said article she cannot depose.

9. To the ninth article of the said Libel and to the several Exhibits therein pleaded and referred to, the Deponent cannot depose.

10. To the tenth article of the said Libel, and to the Paper Writings or Exhibits, marked No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 12, No. 13, No. 14, and No. 15, which are particularly pleaded and exhibited in the 4th, 5th, 8th, and 9th articles of the Libel, on which she is now examined, which said Exhibits purport to be notes and letters, and have now been produced and shewn to and carefully viewed and perused by the Deponent. She saith she is of opinion, and believes that the initial letters "J. D." to the said Exhibits, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, and No. 9, the initial letter "D." to the said Exhibit, No. 12, and the initials "J. D." to the said Exhibits, No. 13, and No. 14 and 15, and the superscriptions thereon were and are respectively of the proper hand-writing and subscription of the said John William Henry Dalrymple, Party in this Cause. And that by the words "My dearest sweet wife," "My dearest sweet love," "My beloved wife," and such like, as well as various other expressions contained in the said letters, was meant and intended, the

said Johanna Dalrymple, his wife, the Party in this Cause, and that John William Henry Dalrymple, who wrote, subscribed, superscribed, and sent the said letters, and Johanna Dalrymple, to whom the same were addressed, under her maiden name of Gordon, and John William Henry Dalrymple, and Johanna Dalrymple, his Wife, the Parties in this Cause, were and are the same persons, and not divers: and further she cannot depose.

CHARLOTTE JOHNSTONE.

50th March, 1809.

Repeated and acknowledged before
Dr. OGILVIE, Surrogate.

Pres. MARK MORLEY,
Notary Public.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

22d April, 1809.

SAMUEL HAWKINS, of Findon, in the County of
Sussex, Esq. aged forty-nine years and upwards,
a Witness produced and sworn.

2. TO the second article of the said Libel, and to the paper writings or exhibits marked No. 1. and No. 2. therein pleaded and referred to, and now produced and shewn to the Deponent, he saith, that he hath been well acquainted with the articulate John William Henry Dalrymple, Party in this Cause, from the month of August or September 1806, to the present time, and hath during that time frequently seen him write and subscribe his name; and hath also received many letters from him, whereby the Deponent hath become well acquainted with his manner and character of

hand-writing and subscription. And having now carefully viewed and perused the Paper-writing or Exhibit marked No. 1. and the endorsement thereon of the words "A Sacred Promise," he saith, that he can and does, without the least doubt or hesitation, depose, that he verily and in his conscience believes the words "I do hereby promise to marry you as soon as it is in my power, and never marry another;" and also the name "J. Dalrymple," written and subscribed in the said Exhibit, marked No. 1. were and are all of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, Party in this Cause. And he further saith, that soon after the commencement of his acquaintance with the said John William Henry Dalrymple, he the Deponent had occasion to correspond with the articulate Johanna Dalrymple, formerly Gordon, also Party in this Cause; and in consequence thereof the Deponent received a great many letters from her, written and dated from Scotland, between the latter end of the said year 1806, and the end of January last past; the last letter he received from her, being dated the 28th of January, 1809, in all of which letters she subscribed herself "J. Gordon," to the best of the Deponent's recollection, excepting in her said letter, in which she subscribed herself "J. Dalrymple," and the Deponent invariably addressed her as Miss Gordon, excepting his reply to her said last letter, which he addressed to her as "Mrs. Dalrymple," and by his so receiving many letters from the said Johanna Dalrymple, formerly Gordon, he thereby became well acquainted with her manner and character of hand-writing and subscription, though he never saw her write. And the Deponent having now again carefully and attentively viewed and perused the said Paper Writing or Exhibit, marked No. 1. and having compared some of the said letters, which he as aforesaid received from the said Johanna Dalrymple, formerly Gordon, with the words "and I promise the same," and also with the name "J. Gordon," written in and subscribed to the said Exhibit No. 1. he saith, that he hath not the least doubt, but does verily believe that the said recited words and signature, were and are of the proper hand-writing and subscription of

the same person; who so as aforesaid, corresponded with the Deponent, and subscribed herself "J. Gordon," and afterwards "J. Dalrymple," and whom he also believes to be the identical Johanna Dalrymple, formerly Gordon, the Party promoting this Cause; but he cannot take upon himself to depose of whose hand-writing the said endorsement "A Sacred Promise" is. And the Deponent having now carefully viewed and perused the said Paper Writing, marked No. 2. he saith, that he does also, without the least doubt or hesitation depose, that the words "I hereby declare, that Johanna Gordon is my lawful Wife, May 28th, 1804," and the name "J. Dalrymple," thereto set and subscribed; and also the three words "and I hereby" commencing the next sentence in the said exhibit, were, and are, as he verily and in his conscience believes, of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, Party in this Cause, and that the remaining part of the said sentence, contained in the following words, "Acknowledge John Dalrymple as my lawful Husband," and the name "J. Gordon," set and subscribed thereto, were, and are of the proper handwriting and subscription of the same person, who as aforesaid corresponded with the Deponent, and subscribed herself "J. Gordon," and afterwards "J. Dalrymple," and whom he believes to be the articulate Johanna Dalrymple, formerly Gordon, the Party promoting this Cause; and he does therefore verily believe, that J. Dalrymple and J. Gordon, who were Parties to, and wrote and signed the said two Exhibits, marked No. 1, and No. 2, and John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, Parties in this Cause, were and are the same persons and not divers. And further he cannot depose to the said Article.

7. To the seventh article of the said Libel, and to the Paper Writings or Exhibits, marked No. 10, and No. 11, therein pleaded and referred to, and now produced and shewn to the Deponent, he saith, that having attentively viewed and perused the said Exhibit, marked No. 10, he hath not the least doubt, but does verily believe, that the whole body, series, and contents of the said exhibit, and also

the name "J. W. H. Dalrymple," thereto set and subscribed, were and are all of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, Party in this Cause, excepting the names and words "J. Gordon," now "J. Dalrymple," appearing subscribed at the end of the said exhibit, and also excepting the name and word "Witness Charlotte Gordon," written at the foot or bottom of the said exhibit, which said names and word "J. Gordon," now "J Dalrymple," he verily believes to be, and he hath no doubt were, and are of the proper hand-writing and subscription of the aforesaid Johanna Dalrymple, Party in this Cause, formerly Gordon, who corresponded with the Deponent, in the manner hereinbefore set forth. And the Deponent having also attentively viewed the initials "J. D." and "J. G." subscribed to the Exhibit or Envelope, marked No. 11, he saith, he doth verily, and in his conscience believe the said initial letters "J. D." to be of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, Party in this Cause; and that the said initial letters "J. G." are of the proper hand-writing and subscription of the aforesaid Johanna Dalrymple, formerly Gordon, Party in this Cause, who corresponded with the Deponent, in the manner hereinbefore set forth, under the name of "J. Gordon," and afterwards of "J. Dalrymple," and the Deponent hath not the least doubt, but does verily believe that John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, who were Parties to the said Exhibits, marked No. 10, and subscribed the same, and set their initials to the said Exhibit or Envelope, marked No. 11, and John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, Parties in this Cause, were, and are the same persons and not divers. And further to the said Article he cannot depose.

10th. To the tenth article of the said Libel the Deponent saith, that having now attentively viewed and perused the several Exhibits annexed to the said Libel, marked No. 3; No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 12,

No. 13, No. 14, and No. 15, particularly pleaded and referred to in the said article, the same having been now produced and shewn to the Deponent, he saith, that he hath not the least doubt, but does verily, and in his conscience believe, that the whole body, series, and contents of the said several Exhibits, and the initial letters "J. D" to the said Exhibits, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, and No. 9, the initial letter "D." to the said Exhibit, No. 12, the initial letters "J. D" to the said Exhibits, No. 13, No. 14, and No. 15, and the several superscriptions thereon were and are respectively of the proper hand-writing and subscription of the said John William Henry Dalrymple, Party in this Cause, and that by the words "My dearest sweet wife," "My dearest sweet love," "My beloved wife," and such like, as well as various other expressions contained in the said letters was meant and intended, the said Johanna Dalrymple, formerly Gordon, Party in this Cause. And also that John William Henry Dalrymple, who wrote, subscribed, and superscribed, the said letters, and Johanna Dalrymple, to whom the same were addressed, under her maiden name of Gordon, and John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, the Parties in this Cause, were and are the same persons, and not divers: and further he cannot depose.

SAMUEL HAWKINS.

Same Day.

Repeated and acknowledged before
Dr. OGILVIE, Surrogate.

Pres. MARK MORLEY,
Notary Public.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

1st May, 1809.

ALEXANDER BRYANT, Clerk to Messrs. Thomas
Coutts and Company, Bankers, in the Strand, in the
County of Middlesex, aged thirty years and upwards,
a Witness produced and sworn.

2. TO the second article of the said Libel, and to the
Paper-Writings or Exhibits, marked No. 1, and No. 2,
annexed to the said Libel, and now produced and shewn
to the Deponent, he saith, he is a Clerk in the House of
Messrs. Thomas Coutts and Company, Bankers, in the
Strand, and hath so been for about seven years, come next
June, and he came first to know the articulate John Wil-
liam Henry Dalrymple, Party in this Cause, about three
or four years ago, (according to the best of his recollec-
tion as to time) by seeing him come to the banking-house
of the said Messrs. Thomas Coutts and Company, upon
business; and afterwards many letters came from him written
from Germany to the said banking-house, which the Depo-
nent knows were answered; and that such answers were
addressed to him, the said John William Henry Dalrymple,
in Germany: and he further saith, that about a year ago
(as well as he is now able to recollect the time) the said John
William Henry Dalrymple, having returned from Germany,
became in the habit of coming to the said banking-house,
when he wanted money, and hath from that time, down
to the present time, been in the habit of so doing, and at
such time he always signs drafts for the money he so draws
out at the said house of Messrs. Thomas Coutts and Company,
who are his bankers; and the Deponent is the person to whom
the said John William Henry Dalrymple hath been in the
general habit of coming to on those occasions. And he, the

Deponent, hath thereby had occasion to see the said John William Henry Dalrymple sign his name to drafts so frequently, that he hath thereby and by seeing the aforesaid correspondence of him the said John William Henry Dalrymple with the said house, whilst he remained in Germany as aforesaid, become perfectly well acquainted with the manner and character of hand-writing and subscription of him the said John William Henry Dalrymple, and having now carefully and attentively viewed and perused the said two Exhibits, marked No. 1, and No. 2, the Deponent saith, that he hath not the least doubt, but does verily, and in his conscience believe, that the words "I do hereby promise to marry you as soon as it is in my power, and never marry another," contained in the said Exhibit, marked No. 1, and the name "J. Dalrymple," thereto subscribed, and also the words and figures "I hereby declare that Johanna Gordon is my lawful wife, May 28th, 1804," the subscription, "J. Dalrymple," and the further words, "and I hereby acknowledge John Dalrymple as my lawful husband," contained in the said Exhibit, marked No. 2, were and are of the proper hand-writing and subscription of him the aforesaid John William Henry Dalrymple, whom the Deponent knows to be the Party in this Cause, and that John William Henry Dalrymple, who was a party to and signed the said two Exhibits, and John William Henry Dalrymple, Party in this Cause, herein before deposed of, was and is one and the same person. And further to the said article he cannot depose.

7. To the seventh article of the said Libel, and to the Paper-Writings, or Exhibits, marked No. 10, and No. 11, to the said Libel annexed, and in the said seventh article particularly pleaded and referred to, the same having been now produced and shewn to, and carefully viewed and perused by the Deponent, he saith, that he does verily, and in his conscience believe, that the whole body, series, and contents of the said Paper-Writing, or Exhibit, marked No. 10, and the name "J. W. H. Dalrymple," thereto subscribed, to be all of the proper hand-writing and subscription of him

the aforesaid John William Henry Dalrymple, Party in this Cause, the person of whom the Deponent hath hereinbefore particularly deposed of, excepting the name "J. Gordon," and the word "now" subscribed and written at the bottom of the said Exhibit, and also except the name and word "Witness, Charlotte Gordon," written under it, which he does not believe to be of the hand-writing of him the said John William Henry Dalrymple, and knows not of whose hand-writing the said two names and words are, nor can he take upon himself to depose of whose hand-writing the said Exhibit, No. 11, or of any part thereof, or of the initial letters "J. D." or "J. G." subscribed thereto, is or are, but has no doubt but that John William Henry Dalrymple, who was a Party to the said exhibit, maked No. 10, and John William Henry Dalrymple, Party in this Cause, hereinbefore particularly deposed of, was and is one and the same person, and not divers; and further he cannot depose to the said article.

10. To the tenth article of the said Libel, and to the Paper-Writings, or Exhibits, marked No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 12, No. 13, No. 14, and No. 15, to the said Libel annexed, and in the fourth, fifth, eighth, and ninth articles of the said Libel, particularly pleaded and exhibited, the same having been now produced and shewn to the Deponent, and he having carefully and attentively viewed and perused the same, the Deponent saith, that he hath not a doubt, but does verily and in his conscience believe, the whole body series and contents of the said several Exhibits, numbered as aforesaid, and the initial letters "J. D." to the said Exhibits, No. 3, No. 4, No. 5, No. 7, No. 8, and No. 9, the initial letter "D." to the said Exhibits, No. 12, No. 14, and No. 15, and the initial letters "J. D." to the said Exhibit, No. 13, and the superscriptions thereon, were and are respectively of the proper hand-writing and subscription of the said John William Henry Dalrymple, Party in this Cause, hereinbefore particularly deposed of, and that the said John William Henry Dalrymple, who so wrote, subscribed, superscribed, and sent the said letters, and John William Henry Dalrymple, Party in this Cause, was

and is one and the same person, and not divers: but further to the said article he cannot depose.

ALEX. BRYANT.

Same day,

Repeated and acknowledged before
Dr. OGILVIE, Surrogate.

Pres. MARK MORLEY,
Notary Public.

On the LIBEL and EXHIBITS given on behalf of
Mrs. DALRYMPLE.

6th May, 1809.

The Most Noble ALEXANDER, DUKE OF
GORDON, of New Norfolk Street, Park Lane, in
the County of Middlesex, aged sixty-five years,
a Witness produced and sworn.

2. TO the second Article of the said Libel, and to the Paper Writings marked No. 1, and No. 2, therein pleaded and referred to, and now produced and shewn to the Deponent, he saith, that he hath been on terms of great intimacy with the family of the articulate Johanna Gordon (in the said Libel called Johanna Dalrymple), for many years, and hath known and been acquainted with the said Johanna Gordon from her childhood, and hath frequently received visits from her, with her father and others of her family, at his, this Deponents's seat, called Gordon Castle, in Scotland; and hath also been on visits to her father, and

hath there been in company with her, and in the course of such his knowledge of, and acquaintance with her the said Johanna Gordon, he often saw her write and subscribe her name, and thereby became well acquainted with her manner and character of hand-writing and subscription, and having now attentively viewed and perused the said two Paper Writings, marked No. 1 and No. 2, he saith, he hath not the least doubt, but does verily, and in his conscience believe that the words “ & I promise the same,” contained in the said Exhibit marked No. 1, and the name, “ J. Gordon,” thereto subscribed, and also the words, “ And I hereby acknowledge John Dalrymple as my lawful husband,” contained in the said Paper Writing or Exhibit, marked No. 2, and the name, “ J. Gordon” thereto subscribed, were and are of the proper hand-writing and subscription of the aforesaid Johanna Gordon, in the said Libel called Johanna Dalrymple, by him the Deponent hereinbefore deposed of, but he cannot take upon himself to depose of whose hand-writing the other parts of the said two Paper Writings, or Exhibits are, but he saith, that he is well satisfied in his own mind that Johanna Gordon, who was a party to, and signed the said two Paper Writings, marked No. 1, and No. 2, and Johanna Gordon by him the Deponent hereinbefore deposed of, whom he knows to be one of the Parties in this Cause by the name of Johanna Dalrymple; wife of the articulate John William Henry Dalrymple, was and is one and the same person, and not divers; and further he cannot depose to the said Article.

7. To the seventh Article of the said Libel, and to the Paper Writings, or Exhibits, marked No. 10, and No. 11, therein pleaded and referred to, and now produced and shewn to the Deponent, he having carefully viewed and perused the same, he saith, that he hath not the least doubt, but does verily and in his conscience, believe that the name and word, “ J. Gordon,” (now) J. Dalrymple, set and subscribed to the said Paper Writing, or Exhibit, marked No. 10, were and are of the proper hand-writing and sub-

scription of the aforesaid Johanna Gordon, by him the Deponent hereinbefore deposed of, and who is in the said Libel called Johanna Dalrymple; but he cannot take upon himself to depose to the hand-writing of the other parts of the said Paper Writing, or Exhibit, or of any part of the said Paper Writing, or Exhibit, marked No. 12. And the Deponent lastly saith, that from circumstances which have come to his knowledge he hath not the least doubt, but does verily believe that Johanna Gordon, now Dalrymple, who was a party to, and signed the said Paper Writing, or Exhibit, marked No. 10, and Johanna Gordon, by him, the Deponent, hereinbefore deposed of, and who is one of the Parties in this Cause, by the name of Johanna Dalrymple, wife of John William Henry Dalrymple, was and is one and the same person, and not divers; and further he cannot depose.

GORDON.

Same day,
Repeated and acknowledged before
Dr. STODDART, Surrogate.
Pres. MARK MORLEY,
Notary Public.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

7th June, 1809.

THE HONOURABLE HENRY ERSKINE, of Ammondell, Advocate, aged about sixty-two years, a Witness produced and sworn, deposes and says, That he has practised as an Advocate in the supreme Court of Session, in Scotland, since 1768, and that he has formerly held the situations of his Majesty's Advocate for Scotland, and Dean of

the Faculty of Advocates ; and further, to the 11th Article of the said Libel he deposes and says, that he has attentively perused and considered the several Exhibits annexed to the Libel, and that, by the Law of Scotland, marriage is merely a civil contract, and may be validly and effectually entered into without the intervention of any religious ceremony in any of the three following ways :

1. By a promise of marriage given in writing, or proved by a reference to the oath of party followed by a copula.

2. By a solemn and deliberate mutual declaration exchanged between a man and a woman, either verbally, or in writing, expressed *per verba de præsenti*, bearing that the parties consent to take each other for husband and wife, a marriage may be formed without any copula, cohabitation, or celebration in *facie ecclesiæ*.

3. Marriage may be established by public cohabitation as man and wife alone. That such being the Law of Scotland, the said exhibits annexed to the libel, are, in the Deponent's opinion, sufficient to establish a legal and effectual marriage between the Plaintiff and the Defendant in the said Cause, independently of any actual celebration, copula, or cohabitation, as man and wife.

HENRY ERSKINE.

The same Witness examined on the Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, that he believes that there is no country to be found, the Law of which, on any particular subject, has not been liable to variations ; but the principles of the Law of Scotland, in regard to the validity of marriage have always been substantially the same as already deposed to ; he conceives that any apparent discrepancy that may be found

in the decisions of the court, arises not from any difficulty as to the principles but the application of them to the facts of particular cases as amounting, or not amounting, in the opinion of the court to that solemn and deliberate consent necessary to constitute marriage, and which, when proved to have been adhibited, has uniformly been adjudged sufficient *per se* to constitute a legal marriage.

2. To the second of the said Interrogatories this Respondent answereth and said, That he collects, or ascertains, the Law of Scotland, regarding the validity of marriages not regularly celebrated, or performed, from the writings of the different authors on its Law, and the train of decisions of its Courts; upon these he forms his opinion what is the precise Law of Scotland at the present day, to which he has already deposed.

3. To the third of the said Interrogatories this Respondent answereth and saith, that there certainly is a material difference between the legal effects of an irrevocable obligation *de futuro* to marry, and an actual marriage (whether constituted by celebration in *facie ecclesiæ*, or by an express consent *de præsenti*,) which last he has already said is equivalent to actual celebration. A promise of marriage, followed by a copula, is just as effectual to produce marriage as actual celebration, or a declaration of consent *de præsenti*; but as a copula cannot, like a written promise of marriage, be proved without the testimony of witnesses, a process at law is necessary to establish a marriage of this description where one of the parties denies its existence. In this respect, a promise and subsequent copula differ from a solemn mutual declaration of consent *de præsenti*, which requires nothing more to complete it, though, were one of the parties to desert, a process of adherence might be necessary, which it would equally be, had a marriage been celebrated in *facie ecclesiæ*.

4. In answer to the fourth of the said Interrogatories, this Respondent answereth and saith, That he conceives this question to be already sufficiently answered. Where a man binds himself irrevocably by an obligation *de futuro* to

marry, and no copula follows, then, certainly the woman, and even the man, may marry a different person, because it is the copula alone that bars the party who gives the promise from resiling. The same would be the case with mutual promises of marriage *de futuro* interchanged, but without consummation.

5. In answer to the 5th of the said Interrogatories this Respondent answereth and saith, That presuming the Interrogatory to apply to a promise of marriage not followed by a copula, such promise may, at any time, be made the ground of a declarator of marriage, unless the party giving the promise shall in the mean time have married another woman, which, as I already said, he may validly do, notwithstanding the previous promise. It would be otherwise, if, instead of a promise *de futuro*, a man and woman had made mutual declarations of consent *de præsenti*, for this, whether followed by a copula or not, would have constituted a marriage, as effectually as celebration in *facie ecclesiæ*.

6. To the 6th of the said Interrogatories, this Respondent answereth and saith, That a promise of marriage, given in Scotland, followed by a copula, would not be affected by the man's going to England, instead of remaining in Scotland; The question, whether if a man who has given a promise of marriage, and consummated in Scotland, should afterwards marry another woman, no action having presently been brought against him, on the previous promise and copula, such marriage would be good, may admit of doubt, though there could have been none, if instead of a promise *de futuro* by the man to the woman, there had been mutual declarations of consent, *de præsenti*. It is in this, that the difference between the one mode of constituting marriage by the law of Scotland, and the other chiefly consists. At the same time, the Deponent knows of no case where a marriage made by a man, with one woman, after he had given a promise of marriage to another woman, followed by a copula, was found to be good, though he considers that the principle, recognized in a case observed by Lord Stair, 31st January, 1665, *Baptic contra Barclay*, would support

the general proposition, that though a promise of marriage and copula entitles the woman to have the marriage declared, yet it has not the same effect as a formal marriage, in all respects, though, not that it might be defeated by the man's marrying another woman *in facie ecclesiæ*, before a decree of declarator was obtained against him. But this Respondent saith, that where the marriage is constituted by mutual declarations *de præsenti*, every consequence must follow equally as from the most formal marriages, and, therefore, that a marriage with another person afterwards entered into by either of the parties, would be null, though no declarator had been previously obtained; and whether such subsequent marriage took place in Scotland or England, or the party contracting it was a Scotsman, or a domiciled Englishman, or possessed or not possessed of any property or effects in Scotland.

7. In answer to the seventh of the said Interrogatories this Respondent answereth and saith, That if a man gives a declaration in writing to a woman, whereby he declares her to be his lawful wife, such a declaration constitutes a lawful marriage, and not merely an obligation to marry.

8. In answer to the eighth of said Interrogatories, this Respondent answereth and saith, that such a declaration in writing, *per se*, renders the marriage complete; and that the copula being before or after the declaration, can have no effect on the validity of the marriage.

9. In answer to the ninth of said Interrogatories, this Respondent answereth and saith, That if a man gives a writing to a woman, acknowledging that he is her husband, and the two parties correspond with each other in writing, calling each other husband and wife, this will constitute a marriage, and not merely an obligation to marry.

10. In answer to the 10th of said Interrogatories, this Respondent answereth and saith, That the essence of the consent, by which alone marriage is constituted by the law of Scotland, is its being made seriously and deliberately *animo contrahendi matrimonium*. It is competent therefore to adduce

in evidence any circumstances in the mutual conduct of the Parties demonstrative that there was something intended by them when the declarations were given, different from a serious intention to contract marriage. But where the words, in which the declarations are conceived are clear and unambiguous, the Case must be made out by facts, completely probative of a contrary intention on the part of both the man and woman. In the Case of More, contra M'Innes, 20th Dec. 1781, the House of Lords reversed a decision of the Court of Session, which had declared a marriage founded on a written declaration by a man to a woman. But that most honourable House proceeded on an opinion that there was evidence to shew that the declaration had been given and accepted of for a different purpose from that of constituting marriage. The same was the ground of judgment in the House of Lords, in the Case of Taylor, contra Kello, 16th Feb. 1786. But in neither of these Cases was there any doubt expressed by the Noble Lord, who delivered the opinion of the House, that the written declarations would have been sufficient to constitute marriage, if appearing to have been given *eo intuitu*. Further, this Respondent saith, that he does not conceive that mere expressions of fear by the one party of being deserted by the other, or a desire to be married *in facie ecclesiæ*, though expressed by both, would, according to the law of Scotland, have the effect to prevent a previous written declaration of consent *de præsenti*, from establishing a marriage.

HENRY ERSKINE.

The same Witness examined on the additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1, 2. To the first and second of the said additional Interrogatories, this Respondent answereth and saith, that he conceives that what he formerly deposed, in answer to the second of the original Interrogatories, affords a sufficient answer to

both these additional Interrogatories. Sir Thomas Craig, and Lord Stair, are two of the authors, on whose authority he forms his opinion, and he believes their opinions to be equally agreeable to the law of Scotland, at the time these authors wrote, and to the law of Scotland as it now stands. He knows of no change that has taken place on the general principles of law as laid down by those learned authors, though in applying them to different Cases, there may have been a variety of opinions amongst the judges, as there necessarily will be among judges as well as jurymen in circumstantiate cases, where the doubt is as to the fact and not as to the law.

3. To the third of the said additional Interrogatories, this Respondent answereth and saith, That he conceives the decision in the Case of Pennycook and Grinton, contra Grinton and Graite, 15th Dec. 1752, to have been agreeable to the principle laid down by Sir Thomas Craig and Lord Stair; That was certainly a case attended with very peculiar circumstances, but consonant with these legal authorities, it could not have been otherwise decided unless the Court on considering the evidence, had been of opinion that the conduct of the pursuer afforded evidence that the promises upon which she founded, were not of that serious and deliberate nature as when joined with a subsequent *copula* to form a consent *de præsenti*, which is the principle on which Lord Stair holds a *copula*, following a promise to constitute a marriage, in the same way as a consent *de præsenti*, or actual celebration.

4. To the fourth of said additional Interrogatories, this Respondent answereth and saith, That he knows of no case decided by the Commissaries, since that last mentioned, where precisely similar circumstances occurred; that he has already noticed in his former deposition, the cases of More, contra M'Innes, and Taylor, contra Kello, where the House of Lords differed from the Court of Sessions as to the sufficiency of the evidence of consent to constitute marriage; but he repeats that in those cases the judgments were reversed solely on this ground, that the learned judge who decided was of opinion, in point of fact, that the written declarations had not been

granted with a view to constitute a marriage, but for different purposes. That the judgment of the Court of Session and the House of Lords therefore were equally consistent with what this Respondent has already deposed to be the law of Scotland.

5. To the fifth of said additional Interrogatories, this Respondent answereth and saith, That where the law in any case appears to be clear on general principles, the Court of Session are in use to disregard a solitary decision, contrary to those principles, and to decide as if no such decision had existed; but the Respondent is clearly of opinion that where a *series rerum judicatarum* occurs, and those decisions are consonant with the opinions of the learned writers on the law, the Court of Session would be exceeding their power were they to disregard these former decisions, and he knows that it is not the practice of the Court to do so.

6. To the sixth of the said additional Interrogatories this Respondent answereth and saith, That he considers what he has just said as a full answer to this Interrogatory, with this addition, that where the Court of Session doubt as to a point formerly decided, they usually have it heard in their presence, both on the general principles that apply to the case, and upon the effect that ought to be given to former decisions.

7. To the seventh of said additional Interrogatories, this Respondent answereth and saith, that taking this Interrogatory generally, he conceives it to be already answered; that if it imports the question whether in the witness's opinion the Court of Session are bound by the existing precedents on the law of marriage, he has no difficulty to say that they are so bound, not only from the number of them and the uniformity of principle that pervades them all, but from their consonance with the opinions of the law-writers of the first eminence both ancient and modern.

8. To the eighth of said additional Interrogatories, this Respondent answereth and saith, That he considers the case of Pennycook to be of authority and recognized by subsequent practice as to the principle on which it proceeded, viz. that a promise, *cum copulâ*, makes a complete marriage. Lord

Kames, in his *Elucidations*, No. 5, says, "The judges were almost unanimous that a promise, *cum copula*, makes a complete marriage," which is precisely the doctrine laid down by Lord Stair.

9. To the ninth of said additional Interrogatories this Respondent answereth and saith, That he conceives he has already answered this Interrogatory.

10. To the tenth of said additional Interrogatories this Respondent answereth and saith, That where writings sufficient *per se* to constitute a marriage exist, the marriage is thereby constituted, and therefore their not being produced till one of the parties has married another, can have no legal effect to annul the prior marriage. At the same time as such prior marriage, whether constituted by mutual declarations *de præsenti*, or by a promise of marriage and *copula* subsequent, rests entirely upon consent, and in every such case it must be at issue whether such consent was solemn and deliberate, *animo contrahendi matrimonium*, or otherwise. The conduct of the party alledging the marriage must necessarily be an important ingredient in the evidence, and his or her having withheld the writings, and kept back her claim, when aware that the other party was publicly forming a matrimonial connection, may certainly be founded on in the question of fact. But it can have no effect on the law of the case, as no act of one of the parties can dissolve a marriage, once legally constituted, by any of the forms by which the law of Scotland allows marriage to be constituted, whether by actual celebration, by mutual declarations of consent *de præsenti*, or by promise of marriage *de futuro*, changed into consent *de præsenti*, by the intervention of a *copula*.

11. To the eleventh of said additional Interrogatories this Respondent answereth and saith, That he considers what he has just said in answer to the immediately preceding Interrogatory, as a sufficient answer to this Interrogatory.

12. To the twelfth of said additional Interrogatories this Respondent answereth and saith, That all contracts solemnly entered into according to the law of the country where the parties are resident for the time, must be binding, whether the

parties are strangers or natives, or domiciled, or not domiciled in such place. That the Respondent knows of no distinction between officers of the army and other strangers in this respect. And he has no doubt that were an officer of the army to live with a woman in Scotland, and pass her as his wife, it would be sufficient to constitute a marriage, unless there were circumstances of fact to shew that there had been an understanding between the parties to the contrary; for the evidence of such understanding would put an end to that evidence of consent, by which marriage by the law of Scotland is effectually constituted. But the Respondent conceives that the mere allegation of the one party that marriage was not intended, and that being a stranger he was unacquainted with the law of Scotland will not avail him. In the case of Margaret Aitken, contra Topham, an Englishman, who, on several occasions, had acknowledged her as his wife, Topham's plea, that he was ignorant of the law of Scotland, and that on the occasions when he called her his wife, he did so merely as a cover, was overruled. In that case no decision was ever pronounced, it having been discovered that Margaret Aitken was married before her connection with Topham, and that her husband was still alive.

13, 14, 15, 16, 17. To the thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth, of said additional Interrogatories this Respondent answereth and saith, That these Interrogatories appear to him to be entirely hypothetical and unconnected with the question at issue, and that he does not consider himself as at liberty to give any decided opinion, having no authorities of the law of Scotland to direct him. His own impression is, that on the principle peculiar to the law of Scotland, a promise of marriage, followed by a copula, constitutes a marriage, on the footing that the promise by virtue of the copula, becomes a consent *de præsenti*; the promise and the copula, in order to constitute a marriage, should both take place in Scotland, and that where this is the case the domicile of the parties is as much out of the question as if the marriage were celebrated in Scotland, in *facie ecclesiæ*, which may be

the case, though the domicile of both or either of the parties may be in a different country.

18. To the eighteenth of said additional Interrogatories this Respondent answereth and saith, That he has already deposed to the principle upon which a promise and copula constitute a marriage, viz. that to use the words of Lord Stair, "by natural commixtion, where there hath been a promise preceding, there is presumed a conjugal consent *de præsenti*." And therefore the Respondent is of opinion that where a promise and copula occur, neither party is at liberty to contract another marriage, any more than if the marriage had been established by express mutual consent, *de præsenti*, or even a celebration in *facie ecclesiæ*, which last has no stronger effect by the law of Scotland than either of the former, except that it proves more indubitably that serious and deliberate consent which alone is required to constitute marriage.

19, 20. To the nineteenth and twentieth of said additional Interrogatories this Respondent answereth and saith, that where the obligation or promise to marry is merely *de futuro*, and no copula has followed to convert the promise *de futuro* into a consent *de præsenti*, the party resiling can only be subjected in damages; the case would be different if there were evidence of a solemn and deliberate consent, *de præsenti*, for there would be legal grounds for declaring a marriage independent of a copula.

21. To the twenty-first of said additional Interrogatories this Respondent answereth and saith, that he conceives that this query is already sufficiently answered, and that the doctrine of Mr. Erskine, in the passage referred to in the query, does, in the Respondent's apprehension, completely establish the proposition; that to use the words of that learned author, in the passage referred to, "Both our judges and writers are agreed that a copula, subsequent to a promise, constitutes marriage, from a presumption or fiction that the consent *de præsenti*, which is essential to marriage, was at that moment mutually given by the parties in consequence of the anterior promise. St. B. 1. T. 4, s. 6. and B. 3. T. 3, S. 42, and

New Coll. No. 146. "That the same writer, the latest and not the least respectable authority in the law of Scotland, speaking in the subsequent section of the constitution of marriage by the consent *de præsenti*, expressly states it as capable of being perfected without the intervention of any ceremony by the mere consent of parties declared by writing, provided the writing be so conceived as necessarily to import their present consent."

22. To the twenty-second of said additional Interrogatories this Respondent answereth and saith, That although a promise of marriage and copula subsequent, create a legal presumption that a mutual consent was given at the moment of the copula, yet certainly it must be open to the party either to disprove the existence of the promise, or to prove *habili modo*, that it was made *alio animo*, than that of constituting marriage. That the same is the case even in mutual written declarations of consent *de præsenti*, and it was on this ground that the decisions in the case of More and M'Innes, and Taylor and Kello proceeded. Indeed as marriage, *in facie ecclesiæ*, by the law of Scotland, is neither a sacrament nor a necessary ceremony to constitute the matrimonial union, that cases might occur where a marriage by a clergyman might be insufficient from it being proved that anterior to the celebration, the parties had interchanged written declarations that the ceremony was to be effected for a totally different purpose, and should not be binding upon either of them. But the Respondent conceives that to take off the effect of a written consent *de præsenti*, or a promise of marriage followed by a copula, will require the most clear and decisive facts applicable to both the parties, sufficient to shew that the written declaration or promise was given for a purpose different from that of contracting marriage, and a proof of those facts by the most unexceptionable evidence.

23. To the twenty-third of said additional Interrogatories this Respondent answereth and saith, That in his opinion it matters not whether the promise has been given by the woman or by the man, if a copula follows, as the promise and copula taken together amount to a mutual consent *de præsenti*.

24. To the twenty-fourth of said additional Interrogatories this Respondent answereth and saith, That he has already said that the doctrine that a promise of marriage with a subsequent copula does actually constitute a marriage, is not only reconcileable with the ancient authorities in the law of Scotland, including those of Sir Thomas Craig and Lord Stair, but is expressly laid down by those learned lawyers, and especially by Lord Stair. As to the question whether the work of Lord Stair contains many mistakes, and whether the passages referred to are not loosely and inaccurately expressed, the Respondent says, that Lord Stair, like every other writer, may have fallen into errors ; but he considers his Lordship as an author of the very highest authority, and, as to the passages referred to, the Respondent sees neither looseness nor inaccuracy. That as to the question what degree of weight ought to be given to Lord Stair's authority, or to the editions of his works, as proving to a certainty what his opinion was, the Respondent can give no answer further than that in the court on this, as well as on every other subject, the greatest deference has always been paid to Lord Stair's authority.

25, 26. To the twenty-fifth and twenty-sixth of said additional Interrogatories this Respondent answereth and saith, That contracts of marriage, though merely *sponsalia de futuro*, are no doubt conceived *per verba de præsenti*, as expressed in the query, but in practice there is always superadded, an obligation to celebrate the marriage with all convenient speed, which is sufficient to confine the former expression, to a mere obligation *de futuro*. Where one of the parties therefore resiles, a claim of damages only will lie, as in the case of a promise of marriage, not followed by copula ; though if a copula were to follow a contract of marriage, it would become a consent *de præsenti*, and the marriage would be completed. That the Respondent considers the expressions of consent, contained in the exhibits followed, as they are by no obligation to complete a marriage by actual celebration, as a complete consent *de præsenti*, such as the law holds sufficient *per se* to constitute marriage, and therefore very different from

the expressions of consent, usually contained in contracts of Marriage.

27. To the twenty-seventh of said additional Interrogatories this Respondent answereth and saith, That in his examination in chief, he has already deposed, that he considers the exhibits, particularly the mutual declaration, as sufficient *per se*, to constitute a marriage between the parties; and it is unnecessary therefore to add, that they are of such a nature, as to bar either of the parties from retracting. That the Respondent considers the effect of the exhibits to be such, that in a question with any third party having an interest, a mutual retraction by the parties would be of no avail, nor could it even, as between themselves, have any effect to annul the marriage, however it might affect their patrimonial interest, as husband and wife.

28. To the twenty-eighth of said additional Interrogatories this Respondent answereth and saith, That the first part of it has been already answered; that as to the latter question, what would have been the Defendant's remedy if the Plaintiff had destroyed the Exhibits? the answer is very plain, he would just have been in the very same situation with any other party to a mutual contract, where there is but one copy of the agreement, and that has been destroyed by the other party, to whom the custody of it was given. The party founding upon it, would be under the necessity of either proving the tenor of the writing, or establishing the existence of the agreement, by a reference to the oath of the other party; but it is impossible to suppose, that because one of the parties might have destroyed the document, it shall therefore have no binding effect upon either of them.

29. To the twenty-ninth of said additional Interrogatories this Respondent answereth and saith, That he does not know any case before that of M^cAdam contra M^cAdam, where precisely in such circumstances, a mere declaration of consent *de præsenti* was held to constitute a marriage, *per verba de præsenti*. But he knows of no case where that general proposition has been seriously disputed, and it is laid down as the law of Scotland, by all the authorities already referred

to. Indeed the proposition taken in the abstract, was scarcely disputed in the case of M^cAdam; the argument of the party who disputed the effect of the declaration, being chiefly directed to an attempt to show that the declaration could not have been seriously and deliberately made *animo contrahendi matrimonium*, and that Mr. M^cAdam at the time he made it, was in a state of insanity, which fact was the subject of a long proof, which would have been altogether unnecessary, if in point of law such a declaration of consent *de præsenti* was insufficient to constitute a marriage.

30. To the thirtieth of said additional Interrogatories this Respondent answereth and saith, That he conceives that he has already answered this query, by what he has said in answer to the twenty-fifth of said additional Interrogatories.

31. To the thirty-first of said additional Interrogatories this Respondent answereth and saith, That where a marriage has taken place, between a man and woman, in the way and manner which the law of Scotland authorizes, neither of the parties can marry again, and it is not in the power of one of the parties to annul the marriage by lying by, while the other contracts a marriage with another. If therefore a promise of marriage, followed by a copula, does by the law of Scotland constitute an effectual marriage, it follows that the second marriage, however public and regular, would be void according to the law of Scotland, just in the same way, as if the first marriage, as well as the second, had been celebrated in *facie ecclesie*. That the only effect, which, in the Respondent's opinion, could be given to the woman claiming in virtue of the promise and copula, having lain by, without objecting to the second marriage taking place, knowing it to be seriously intended, would be this; that her conduct would afford a strong piece of presumptive evidence to show, that the promise of marriage had not been seriously made or received, and therefore was not such a promise as the law requires, when followed by a copula to constitute a marriage. But the Respondent does not conceive that this conduct on the part of the woman, would, independently of other circumstances, be sufficient to take off the effect

of the promise and copula; and the Respondent presumes, that in the case observed by Lord Stair, 31st January, 1675, Beattie contra Barclay, referred to in the Respondent's answer to the fifth of the original Interrogatories, the court must have proceeded on something more than merely the woman's having lain by, without bringing a declaration of marriage against him. The man, in that case, does not appear to have married another; nothing more was found, than that the presumption *pater est quem nuptiæ demonstrant* did not take place, as if there had been a formal marriage, so that the woman was bound to prove a copula, after the date of the promise.

The same Witness examined on the further additional Interrogatories, given on behalf of John William Henry Dalrymple, Esq. the other Party in this Cause.

1. To the first of the said further additional Interrogatories this Respondent answereth and saith, That he considers the decision, in the case of Jean Campbell contra Magdalene Cochrane, as one of a very peculiar nature, and that it could not have been decided, upon the ground that the conduct of Magdalene Cochrane in having allowed Mr. Campbell to marry another, without objection, was sufficient to bar her claim to have her marriage declared. Magdalene Cochrane, did not alledge merely a promise of marriage and copula following, to which alone such an objection could apply; on the contrary, she expressly averred that she had been privately married to Mr. Campbell, by Mr. William Cockburn, an episcopal Minister, in the presence of witnesses whom she named, so that the marriage, which she alledged, was every bit as regular as that which Mr. Campbell afterwards contracted with her competitor, which was also an irregular one. It was impossible that the court could mean to find that a marriage actually celebrated with

one woman, could be annulled by a marriage with another, merely because the first wife had not previously taken any steps to have her marriage declared ; and the Respondent therefore presumes, that as Magdalen Cochrane had no writing to produce, in order to prove the celebration of a former marriage, or even a promise of marriage, the court must have refused to allow her a proof by witnesses, merely because she offered to establish facts, some of which could only be competently proved by writing, and others which were totally inconsistent with the whole of her own conduct ; that if the court proceeded on any other ground, the Respondent would, with great deference presume to say, that the decision was ill founded, and he would be warranted to say so from the subsequent decision in the case of Pennycook and Grinton, contra Grinton and Graite.

2, 3. To the second and third of said further additional Interrogatories this Respondent answereth and saith, That in the case of Elizabeth Lining contra Hamilton, there does not appear to have been any promise of marriage ; if there had, there can be no doubt that Elizabeth Lining, instead of being merely found entitled to damages, would have had her marriage declared. That with regard to the cases referred to by Lord Kilkerran, in the first of them, Kerr contra Hislop, there seems to have been no promise of marriage ; as to the other, Castlelaw contra Agnew, of Shenchau, the Respondent does not find it collected ; Lord Kilkerran is mistaken in saying that in both cases there was a promise of marriage, for the contrary appears, from the case of Kerr contra Hislop, as collected by Lord Fountainhall, and in the other case, his Lordship says, the adherence was not insisted on. That the Respondent does not therefore conceive, that any conclusion can be drawn from Lord Kilkerran's notice of these two cases, inconsistent with the general doctrines of law, to which the Respondent has given his opinion, or tending to show, that by the law of Scotland in 1696 a promise of marriage, followed by a copula, did not constitute a marriage.

4. To the fourth of said additional Interrogatories this

Respondent answereth and saith, that he has looked into the passage in Lord Kames's Elucidations, referred to, in which he perceives that his Lordship had doubts of the propriety of the judgment in the case of Pennycook and Grinton, contra Grinton and Graite; but with great deference to that learned writer, who very frequently indulged himself in speculations, as to what the law of Scotland ought to be, rather than in discussing what it really was, the Respondent continues of opinion, that that case, however hard it may appear, was decided upon the true principles of the law of Scotland.

HENRY ERSKINE.

22d August, 1809.

Repeated and acknowledged before me,
at Edinburgh, the undersigned
WM. COULTER, Lord Provost.

In the Presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

7th June, 1809.

ROBERT CRAIGIE, Esq. of the city of Edinburgh, Advocate, aged about fifty-three years, a witness produced and sworn, deposes and says; that he has practised as an Advocate before the supreme Court of Session in Scotland since 1776, and further to the eleventh article of the said Libel he deposes and says, that he has attentively perused and considered the several Exhibits, annexed to the Libel, and that according to his opinion and belief, by the law of

Scotland, marriage may be completed between two persons of proper age and free to enter into such an engagement, not only by actual celebration in *facie ecclesiæ*, but by cohabitation as man and wife, and also by a mutual declaration of the parties to that effect; and besides this, it appears to the Deponent to have been settled in the case of Pennycook contra Grinton, 15 Dec. 1752, and the authorities there quoted, and the Deponent believes has been since held as law, that a promise of marriage followed with a copula does not merely warrant the courts of law to compel performance of the promise, but without any judicial interference constitutes that relation between the parties. But although all these are legal modes of constituting marriage by the law of Scotland, the one first mentioned is the only one which can be deemed altogether unexceptionable, and not admitting of any proof or argument to the contrary: all the others, though affording *prima facie* evidence of a marriage, admit of explanation from collateral circumstances. It is held to be competent to prove that the acts were not meant by the parties to constitute a marriage, nay, it has been determined that the effect of them might be wrought off by the after conduct of parties, at least so far as third parties are interested. These propositions the Deponent considers as established by the decisions 20th December, 1781, More contra M'Innes, 3d March, 1786, Robertson contra Inglis, 16th February 1786, Taylor contra Kello, 6th December, 1796, M'Laughlane contra Dobson, 13th June, 1801, Napier not reported, and 29th June, 1751, Campbell contra Cockrane, not reported, but the particulars to be found in the Session Papers, in the case of Napier. In the present case there has been no regular marriage, nor, as the Deponent thinks, cohabitation as man and wife, in the legal sense of these words. The Plaintiff's claim, therefore, on the Deponent's opinion, must rest on one or other of the two grounds last mentioned, viz. either a mutual declaration, or acknowledgment, as to the parties being man and wife; or a promise and copula: and the evidence as to the obligation or engagements of the parties which has been produced, appear to be of three kinds; No. 1

of the Exhibits contains a promise of marriage ; No. 2 contains a mutual acknowledgment as explicit as possible that the parties were man and wife ; in No. 10 there is an acknowledgment equally explicit on the part of the Defendant, but the counter part of it by the Plaintiff appears, in the Deponent's opinion, to import a promise or undertaking that unless in extreme necessity, (the nature of which is not mentioned) she would never avow the connection, which at least in a question with third parties, might, in certain circumstances, preclude a claim on her part to the conjugal rights. In No. 14 there is a request on the part of the Defendant for another declaration by the Plaintiff which, if it was sent and conceived in unqualified terms, would, in the Deponent's opinion, import a mutual engagement ; and in the other numbers there are expressions, which the letters having been received and not rejected by the Plaintiff, may (as the Deponent thinks) be considered as binding on her, and therefore forming a mutual engagement. And especially, if these letters could be combined and connected with letters by the Plaintiff in the same or similar terms, and not counteracted by inconsistent acts or other expressions of a contrary tendency, this also, in the Deponent's opinion, would be sufficient to establish a marriage : but without such letters from the Plaintiff the Deponent conceives it may with some justice be contended, that the letters from the Defendant can only be considered as a promise of marriage ; and from some passages in the letters, (vide particularly No. 4, 5, 12, 13, 14) there appears to the Deponent some room to think, that notwithstanding the promises and declarations, and the appellations of husband and wife, and other expressions of similar import, the Defendant did not consider himself or the Plaintiff to be unalterably bound, but that either might withdraw from the connection and marry with another person. And there are also some passages which, in the Deponent's opinion, tend to create a belief that the Plaintiff in her letters had expressed herself to the same effect ; and these explanations appear to the Deponent to limit and qualify, not only the letters, but also the promise and declarations, all of them being to be taken

together, and the true deliberate meaning of the parties to be extracted from the whole. As to the evidence of the copula, it appears to the Deponent, that it had been attempted in the end of May, 1804, No. 4, but then for the first time: but from other passages in the same letter, and also in No. 5, in the Deponent's opinion, it may be strongly inferred that a copula had taken place. And the arrangements as to "a room" in No. 6 and 7, go strongly, as the Deponent thinks, to authorize a conclusion that a copula had taken place. From the foregoing explanation and analysis of the evidence, the result in the Deponent's opinion and belief is, that if the question were to be tried in Scotland, and if no other or further evidence could be obtained, the decision it is thought would be favourable to the Plaintiff; but it is thought that in the circumstances of this case the courts of law in Scotland would not immediately proceed to a determination upon the evidence as it stands. As the Plaintiff might compel the Defendant to produce the letters written by her to him, and in general all writings that had passed between them, the courts would, in all probability, afford the necessary authority for these purposes. And if the copula has not been expressly admitted in the pleadings for the Defendant, they would allow also a proof on that subject.

RO. CRAIGIE.

The same Witness examined on the Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, That the law of Scotland, in regard to the validity of marriages not regularly celebrated, cannot well be said in general to be doubtful and indefinite. But the application of the law to existing cases, has, from the circumstances already mentioned by the Respondent, become oft times very doubtful and uncertain.

2. To the second of the said Interrogatories, this Respondent answereth and saith, That the law of Scotland, as to marriages not regularly celebrated, depending on no express enactments, must be gathered from the authorities of writers on the law, and the decisions of the courts of law in Scotland; and, upon an observation of those authorities and precedents, the Respondent's opinion has been formed with regard to such marriages.

3. To the third of the said Interrogatories this Respondent answereth and saith, That, "if by an irrevocable obligation to marry," is meant a promise unconditional and absolute on one side, or even a mutual promise with regard to a marriage *in futuro*, not followed with copula, this in certain circumstances may authorize a claim of damages; but if such promise to marry be followed with a copula, or consummation, it will, as has been already deposed to, constitute a marriage, and not merely an obligation to marry.

4. To the fourth of the said Interrogatories this Respondent answereth and saith, That in the case where the obligation to marry is unilateral, that is, proceeding from the man or the woman, without any thing expressive of, or implying a mutual obligation on the other side, it cannot be held to constitute marriage; and consequently it will not afford an effectual bar to a marriage with a third party.

5. To the fifth of the said Interrogatories this Respondent answereth and saith, That in all cases the right to have a marriage declared must depend upon the reciprocal obligations of the parties at the time when the right is to be enforced in a court of law, both of them being bound to perform, or neither.

6. To the sixth of the said Interrogatories this Respondent answereth and saith, That as a promise to marry a particular woman followed by a copula or consummation, in Scotland is held to constitute marriage, it must prevent the man from marrying another woman, and the woman from marrying another man, either in England or any other place; and this, whether the marriage has been declared binding in the courts of law in Scotland, or not; and if the parties are thus

effectually married, no marriage afterwards taking place in England or elsewhere, can, in the Respondent's opinion, be binding, or followed with any legal effects; although exceptions occur in such cases as those of Campbell and Napier, formerly mentioned by the Respondent, where, in consequence of long silence, or taciturnity, as it is called in Scotland, in asserting the conjugal rights, a party has been held to be barred from claiming those rights in a question with another party, who, by reason of that silence or taciturnity, has been led to form a matrimonial connection with the husband or wife of the party so silent or delaying.

7. To the seventh of the said Interrogatories this Respondent answereth and saith, That a declaration in writing given by a man to a woman, or vice versa, without a counter declaration on the other side, can, in general, be held only as implying a promise of marriage; at the same time, if the party to whom the declaration is addressed, shall acquiesce in the declaration, or shall by his or her acts and deeds indicate acquiescence, this, without an express written declaration, may be considered as equivalent to a mutual declaration, which, if deliberately given, will be sufficient to constitute a marriage.

8. To the eighth of the said Interrogatories this Respondent answereth and saith, That the question whether a copula prior to a promise will constitute a marriage or only an obligation to marry if a promise follows, has not, so far as the Respondent knows, been precisely determined; and the result, in the Respondent's opinion, would be somewhat doubtful; though he rather thinks that it would not defeat the ordinary effect of a promise of marriage followed with a copula, that there had been a copula preceding such promise.

9. To the ninth of the said Interrogatories this Respondent answereth and saith, That the mutual declarations of the parties, if clear and in words *de præsenti*, will, in the Deponent's opinion, as formerly stated, constitute marriage, and not merely an obligation to marry; or if the parties should correspond with each other, calling themselves husband and wife, this also will, in general, be held sufficient.

10. To the tenth of the said Interrogatories this Respondent answereth and saith, That although in the case last above stated, the law in general stands as he has said, such mutual declarations may be counteracted by other writings of a contrary tendency, or by acts and deeds of the parties affording real evidence to the contrary ; and in all those cases, the declarations of the parties must be taken with all the attendant circumstances, and if there is reason to conclude from the expressions used by them, that both, or either of the parties did not understand that they were truly man and wife, or that the declarations were intended for a particular purpose, and not with the view of constituting the irrevocable union of marriage, all this will enter into the question whether the parties are married, or only under an obligation to marry. But it is almost impossible to say, *a priori*, in what manner and to what extent in all circumstances, these qualifications or limitations are to operate.

RO. CRAIGIE.

The same Witness examined on the additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said additional Interrogatories this Respondent answereth and saith, That the passages here referred to in Sir Thomas Craig, cannot be held as proof of the Law of Scotland, unless so far as they are supported by the decisions of the courts of law, or the general and concurring opinions of contemporary lawyers. The passages, however, referred to, so far as applicable to the state of the Parties in this Cause, do not appear to differ much, or in substance, from what is now held to be law ; neither does it appear to the Respondent, that the Law of Scotland, as to what constitutes a valid marriage, has been materially altered since the time of Sir Thomas Craig.

2. To the second of the said additional Interrogatories this Respondent answereth and saith, That the observations immediately before made, appear to him to be applicable to this Interrogatory, as well as to the preceding one.

3. To the third of the said additional Interrogatories this Respondent answereth and saith, That the decision here referred to, appears to this Respondent to be agreeable to the authorities there mentioned. It is expressly stated in the report of the case by the faculty, that the cause was decided on the general point, and the Respondent has been led to consider the law as fixed, although he cannot, at this time, mention any particular case in which the same decision was, *in terminis*, given. And upon the principles there laid down, it appears to this Respondent, that no *bona fides* on the part of a woman entering into a marriage with a man already legally married, according to the principles of the decision, could annul the former marriage, or render the marriage entered into by her a legal or valid one.

4. To the fourth of the said additional Interrogatories this Respondent answereth and saith, That he has no recollection of any case similar, or nearly similar, to that of Pennycook; but as he has already stated he has considered, and still considers, that decision as a precedent, the authority of which ought not to be questioned.

5. To the fifth of the said additional Interrogatories this Respondent answereth and saith, that in those cases where there are no express enactments, the Court of Session is in general much governed by precedents, and where a determination has been given upon a general point of law, after an argument at the bar, or in printed pleadings, it is not usual for the Court to pronounce an opposite judgment. The Respondent, however, understands that it is not one decision, unless it has been long acquiesced in, but a succession of them, or series *rerum judicatarum*, that makes or ascertains what is law: And he has no doubt that there are instances, in which the Court of Session has deviated from what was formerly decided, although he believes it will be found upon examination, that these deviations are much

more rare than is sometimes thought ; what has been considered a deviation, not being truly such, but arising from a proper discrimination of cases, which, at first sight, appear to fall under the principle of a particular decision, but which are, and ought to be, regulated by a different one.

6. To the sixth of said additional Interrogatories this Respondent answereth and saith, That in those cases where the principles of former decisions are considered to be doubtful, and where they are not understood to have acquired the force of precedents, or where a doubt has been entertained whether the principles of prior adjudications can with propriety be applied to the circumstances of existing cases, it is the practice of the Court of Session to appoint a hearing in presence ; and counsel, in such cases, are permitted in general to argue upon the soundness of the principles of law which appear to have governed the decision of former cases, as well as upon the application of those principles to the case before the Court ; but in this a due regard is always paid to the date of the decisions, their uniformity, and to the effect that has been given to them in practice, although there has been no second determination in the same, or nearly in the same circumstances.

7. To the seventh of the said additional Interrogatories this Respondent answereth and saith, That this Interrogatory appears to him to be already answered.

8. To the eighth of the said additional Interrogatories this Respondent answereth and saith, as he has already stated, That the case of Pennycook appears to him to have been well decided at the time, and also corroborated by the subsequent practice.

9. To the ninth of the said additional Interrogatories this Respondent answereth and saith, That the Court of Session, though not absolutely debarred from reviewing the principle of the decision in the case of Pennycook would, in this Respondent's opinion, most reluctantly entertain any argument that could be raised against the authority of the decision ; and, in this Respondent's opinion, it would be most

unsafe, as well as unusual, at this time, to listen to any such argument.

10. To the tenth of said additional Interrogatories, this Respondent answereth and saith, That as the writings necessary in order to establish a marriage not celebrated in a formal manner, require no publication in any record, they must be judged of according to their import when they are produced; although they may not have been generally, or publicly heard of, till one of the parties has intermarried with some one else:

11. To the eleventh of said additional Interrogatories, this Respondent answereth and saith, that holding a promise of marriage, followed by copula, to constitute the relation of marriage, and not merely an obligation to marry, according to the principles laid down in the case of Pennycook, this Respondent thinks no after marriage, however formally celebrated, could annul the former one, or render the second marriage valid. But in judging whether there has been a serious and deliberate promise of marriage, it will properly enter into consideration, that one of the parties deeming himself not married has entered into a formal marriage with another person, because it is not probable that a party knowing or believing himself already married, will enter into a second engagement of the same kind; and where the woman, having at one time acted in such a manner as to infer a legal presumption of marriage, has concealed her state in such a manner as to induce another *bonâ fide* to enter into a marriage with the man with whom she had previously formed such a connection, the decisions in the case of Campbell and Napier go some length to show, that the circumstances here mentioned will be of importance.

12. To the twelfth of said additional Interrogatories, this Respondent answereth and saith, That the subject of this Interrogatory, as well as some of the following ones, appears to this Respondent to be inapplicable to the point, or article in the Libel on which this Respondent understands himself to be examined. And it further occurs to this Respondent, that the Defendant, during the early part of his corres-

pondence with the Plaintiff, having been in Scotland for more than forty days, would, by the Law of Scotland, be considered as domiciled there; and in the matter of contracts, or obligations, subject to the Law of Scotland in the same manner as if he had been born in Scotland, or had resided in it from his birth. And if truly married to the Plaintiff, according to the Law of Scotland, while residing and domiciled in that country, the circumstance of the Defendant's going back to England; and there marrying Miss Manners publicly before the present action was instituted, could not, in this Respondent's opinion, have any effect upon the previous marriage in Scotland.

13. To the thirteenth of said additional Interrogatories this Respondent answereth and saith, That if an officer, or other person, engaged in military service in Scotland, being an Englishman by birth, and generally domiciled in England, were to have such intercourse with a woman in Scotland, as by the Law of Scotland is sufficient to constitute marriage, this would bind such person in the same manner as if he were a Scotsman, or generally domiciled in Scotland. But, in judging of the nature and effects of such intercourse, it would, in this Respondent's opinion, justly enter into consideration, that in England cohabitation as man and wife is not, in all cases, held to constitute marriage; although it may, in certain circumstances create a presumption of a previous celebration; and consequently, that an Englishman accustomed to the Law of England, might cohabit with a woman in Scotland, and allow her to take his name without intending to marry her: And although an Englishman, after cohabiting with a woman in England, and allowing her to take his name, were to bring her down to Scotland and conduct himself there in the manner already stated, this would not, in the opinion of this Respondent, in every case constitute a marriage. This, however, would be no exception to the general rule as already stated by this Respondent, but truly a judicious application of it to the circumstances of the case: The law in all cases, not attending merely to the external act of cohabitation, but

looking to that which is alone decisive, viz. the full and deliberate intention and consent of both parties to become man and wife, which may be inferred from cohabitation, but not necessarily, nor in all cases without exception.

14. To the fourteenth of said additional Interrogatories this Respondent answereth and saith, That a promise of marriage made in England, followed by a copula in Scotland, would, in this Respondent's opinion, be sufficient for obtaining a decree declaring the marriage in the Courts of Scotland, if the parties were to be found there.

15. To the fifteenth of the said additional Interrogatories this Respondent answereth and saith, That if a promise of marriage made in Scotland, were to be followed by a copula in England, this, if the parties were afterwards found in Scotland, would, in this Respondent's opinion, be sufficient for obtaining a decree in the Courts of Scotland.

16. To the sixteenth of the said additional Interrogatories this Respondent answereth and saith, That marriage, by the Law of Scotland, being considered merely as a contract, and requiring only the deliberate consent of both parties, for its completion, it would seem to be enough for obtaining a decree in the Courts of Scotland, that the parties had in any place, or at any time, expressed their deliberate consent, *de presenti*, to be married. It is a different question, however, whether in the circumstances here stated, as well as in those mentioned in the two preceding Interrogatories, the Courts of England, or any other foreign country, where marriage is not completed by consent merely, but in general requires some formal celebration, would so far yield to the Law of Scotland as to give the same decision.

17. To the seventeenth of said additional Interrogatories this Respondent answereth and saith, That in the case here mentioned as the letters written by the Englishman would not *per se* constitute marriage, but would in general require to be confirmed by letters of the same kind written by the woman in Scotland, the agreement could not be considered as mutual till the last mentioned letters were received, and

consequently, it would seem that the marriage could not be said to have been contracted in Scotland. In such a case, however, it appears to this Respondent that the Courts in Scotland, without regarding the *locus contractus* would find the marriage binding, if the question could be effectually tried there.

18, 19. 20. To the eighteenth, nineteenth, and twentieth of the said additional Interrogatories this Respondent answereth and saith, That in general where there is only an obligation to marry, the parties may retract without being liable in damages : And where damages are due, it is not in consequence of the obligation to marry, but either from the manner in which the treaty has been broken off, as where it is attended with circumstances in some degree injurious to one of the parties, (see the case of Johnson against Paisly, 21st December, 1770,) or, where, in contemplation of the marriage, expences have been incurred.

21. To the twenty-first of said additional Interrogatories this Respondent answereth and saith, That the law being now fixed, it does not appear to be of importance to discover the grounds on which it was at first established, although this Respondent has no doubt that they are nearly as stated by Mr. Erskine ; and that in this, as well as in many other cases, the law presumes the parties to have intended that, which in the circumstances of the case, was proper and becoming, and at the same time deducible from their actings ; or, in other words, the law, in such cases justly holds, that persons having formed a connection, the object of which was marriage, would not proceed to consummate unless with the same view.

22. To the twenty-second of said additional Interrogatories this Respondent answereth and saith, That the presumption here mentioned cannot be said to be a *præsumptio juris et de jure*, because it might, in this Respondent's opinion, in certain circumstances be obviated by contrary evidence, e. g. if the man and woman were, previously to the copula, to interchange written declarations of their having determined not to marry each other. But it is a

presumption of law so strongly established, as not to be obviated unless by evidence of the nature here suggested.

23. To the twenty-third of said additional Interrogatories this Respondent answereth and saith, That a promise of marriage, followed by a copula, appears to this Respondent to constitute marriage upon both parties equally and in general, as the Respondent has formerly deposed, the obligations of the parties must be mutual or none at all.

24. To the twenty-fourth of said additional Interrogatories this Respondent answereth and saith, That he has already stated his opinion as to the decision in the case of Pennycook; and, as to the authority of Lord Stair, and the respect that is due to the different editions of his Institutes, this Respondent although greatly doubting the propriety of this Interrogatory, (as well as of some of the preceding ones) saith, that Lord Stair has been always considered as a writer of great authority in Scotland: it is to be observed however that the different parts of his Institutes were composed and published at different periods, and the fourth book was not printed till long after the other three; Lord Stair too being actively engaged in the political world as well as in the line of his profession, could not bestow that attention upon his publications, or in revising them, that was necessary for rendering them perfectly correct in all respects; and the manuscripts from which the different editions have been made out, appear to differ in some instances from each other; nor is there any edition so correct and authentic, as to prove to a certainty what his lordship's opinion was, although that published in 1759, chiefly by the care of the late Sir William Pulteney, is deemed far preferable to the rest.

25. To the twenty-fifth of said additional Interrogatories this Respondent answereth and saith, That the common stile of a contract of marriage in Scotland may, at first sight, appear to import a consent to marriage *de præsenti*, the parties declaring their acceptance of each other for lawful spouses, or using words to that effect; but these expressions are uniformly held, in the practice of Scotland, not to constitute marriage, but espousals only, or sponsalia, as known in the

civil law. The passages of the exhibits formerly referred to by this Respondent, are in his opinion, conceived in different and stronger terms, denoting that the Plaintiff and Defendant were "man and wife;" and in the manner and to the extent already stated by this Respondent, must, in this Respondent's opinion, be held to constitute a valid marriage.

26. To twenty-sixth of said additional Interrogatories this Respondent answereth and saith, That what has been said by him in answer to the immediately preceding Interrogatory, appears to be a sufficient answer to this one also.

27. To the twenty-seventh of the said additional Interrogatories this Respondent answereth and saith, That this Interrogatory appears also to be already answered by this Respondent, when examined in chief.

28. To the twenty-eighth of the said additional Interrogatories this Respondent answereth and saith, That this Interrogatory appears also to be already answered, unless so far as it has been asked, what would have been the Defendant's remedy if the Plaintiff had destroyed the exhibits? to which this Respondent answereth and saith, That in the case here supposed, the Defendant's remedy would have been the same as in the case of a marriage ascertained by a regular certificate of a clergyman, or justice of the Peace, but which certificate has been afterwards destroyed by one or other of the parties; the parties desirous of having the marriage fulfilled, suffering in both cases from want of proof, and not from any defect of right. In both cases, however, the writings so destroyed, might be restored by the remedy of an action for proving the tenor of their contents, and the manner of their being destroyed could be satisfactorily established.

29. To the twenty-ninth of said additional Interrogatories this Respondent answereth and saith, That he does not know of any case before that of M^cAdam, in which it was *in terminis* decided that a mere declaration of consent to marry *per verba de præsenti*, was sufficient to constitute marriage *rebus integris*: but the proposition appears, to this Respondent, to be established by the general and concurring

opinion of all the accredited writers on the Scot's law ; and where the declaration is not to be proved by witnesses, but by written evidence, it appears to this Respondent to be incontrovertible. In the case of M'Adam, the difficulty appears to have arisen, not so much from any doubt as to the principle here laid down, but from the particular circumstances of the case, the parties having previously lived in a state of concubinage, and the declaration by Mr. M'Adam given in a very abrupt manner, and immediately followed by his death by suicide.

30. To the thirtieth of said additional Interrogatories this Respondent answereth and saith, That he has already mentioned the effect of contracts of marriage, to be different from that which is stated in the beginning of the Interrogatory. The effect of a contract of marriage, when followed by a copula, is to make the parties husband and wife in the same manner as a promise of marriage followed by copula ; the only difference being, that in the former case, the promise is proved by a formal writing, whereas, in the other case, it may be proved either by other not so formal writings, or by the oath of party, or by acts and deeds inferring an engagement to marry.

31. To the thirty-first of the said additional Interrogatories this Respondent answereth and saith, That it has been generally held, since the decision in the case of Campbell, that those circumstances which would be deemed sufficient to constitute a marriage, in a question between a man and a woman, having exchanged a promise of marriage, and afterwards known each other carnally, might not be sustained to the same effect where the question arose between one of the parties and a third person, who, in consequence of a studied concealment of the connection, had been led to enter into a formal and regular marriage. One reason for this, is to be found in the impropriety of concealing such an engagement, by which third parties may suffer an irretrievable injury : but another reason, and one more consistent with the law of Scotland with regard to marriage, appears to be, that in the case of marriages not regularly celebrated, but to be

gathered from the words or actings of the parties, every circumstance of their conduct is to be duly weighed, in order to ascertain whether a deliberate promise or consent was given, and whether, in the opinion and intention of the parties themselves, the irrevocable union of marriage had been formed. In this view the concealment of the connection, especially when continued for a great length of time, and in circumstances where the party was called upon to avow the marriage if it had truly taken place, must go far to show that there was no marriage, nor a serious intention to marry in any of the parties.

ROBERT CRAIGIE.

The same Witness examined on the further additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said further additional Interrogatories this Respondent answereth and saith, That he had formerly adverted to the case here noticed, which, after the date of the report by Falconer, underwent a full consideration in the House of Lords, and afterwards in the Consistorial Court of Scotland, having been finally decided on the 29th June, 1751; and having also more largely adverted to the Decision in his answer to the thirty-first additional Interrogatory, he thinks it only necessary to add, that supposing the evidence of the marriage in this case to depend upon the Exhibit, No. 10. and also supposing that the circumstances in the case of the Plaintiff, were in other respects, similar to that of Cochran, the decision in the case last mentioned would certainly be of importance, but to what extent it seems impossible at this time to say.

2, 3. To the second and third of the said further addi-

tional Interrogatories this Respondent answereth and saith, That the case of Kerr and Hyslop, as reported by Fountainhall 15th July, 1696, appears to this Respondent to be quite different from the present one, and in that of Castlelaw against Agnew, which is fully stated in the printed papers, in the case of Linnen against Hamilton, 19th December, 1748, the judgment of the Commissaries, which was affirmed in the Court of Session, was, that the defender's oath did not prove a direct promise of marriage, previous to the connection acknowledged by him: and in the case of Linnen, where also there was a reference to oath, the defender was on similar grounds freed from the conclusions of the action instituted for establishing a marriage, but in a separate action subjected in damages, on account of his "having enticed and seduced the pursuer to yield to his embraces;" and none of the decisions, in this Respondent's opinion, prove that a serious promise of marriage, followed by a copula, was not then held in law as equivalent to marriage.

4, To the fourth of the said further additional Interrogatories this Respondent answereth and saith, That this Respondent has now and formerly read the passage referred to in Lord Kaimes' Elucidations, and has attended to what is there said upon the case of Pennycook, and although this Respondent holds that this Interrogatory is irregular, if not incompetent, he thinks it proper to say in explanation, that the publication here referred to, seems to have been meant by the author, not so much to point out what the law was, but what in his opinion it ought to be; (see preface). And the observations on the subject of marriage, though plausible and ingenious, do not seem to be founded in the law of Scotland. There is no ground for saying that the Priest's blessing is, or ever was, in Scotland (at least since the æra of the reformation in 1560) deemed indispensable, though it is the most regular mode of constituting marriage. The act 1503 was intended to regulate the proceedings in the matter of Terce, by allowing a woman, who had been by common reputation held as a wife, to obtain possession of

the legal allowance out of the lands in which her reputed husband died infeoffed, until it was determined in the courts of law that the parties had not been married. The decisions mentioned by Balfour, and afterwards by Spottiswood, must have been attended with peculiar circumstances, and as stated by these writers, appear to be erroneous, and would not be repeated at this time. In the case of Craig, in 1628, it is probable the decree of the commissaries had been given in absence, (by default) and therefore still subject to review; and the parties, as this Respondent thinks, must have considered it in that light. And the reasonings by Lord Kaimes, as to the effect of a promise of marriage, followed by a copula, appear to be quite inconclusive, and at this time would not be listened to. Indeed, although in some of the later adjudged cases, with regard to marriage, this publication has been referred to, this has been done very slightly, and it has been hardly, if ever, adverted to upon the bench; and although containing some information that is not to be found elsewhere, and much acute and plausible remark, it was never in this Respondent's opinion and belief, considered as of authority in the Courts of Scotland.

ROBERT CRAIGIE.

7th August, 1809.

Repeated and acknowledged at Edinburgh, before me the undersigned
WM. COULTER, Lord Provost.

In the Presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

7th June, 1809.

ROBERT HAMILTON, Esq. of the City of Edinburgh, Advocate, aged about forty-five years, a Witness, produced and sworn, deposes and says,

THAT he has practised as an Advocate before the supreme Court of Session, in Scotland, since 1788; and that he has held the situation of Professor of the Law of Nature, and of Nations, in the Universty of Edinburgh, since 1796, and further to the eleventh article of the said Libel he deposes and says, that he has attentively perused and considered the several Exhibits annexed to the Libel, and that he is of opinion these exhibit and furnish ample grounds for establishing a marriage between the Parties in this Cause by the law of Scotland, and that such marriage is thereby established. That in giving this opinion, he takes it for truth, as averred in the Libel, that a copula or *concubitus* has taken place, and there appears indeed to be presumptive evidence of it, from certain expressions in the Defendant's letters (No. 4 and No. 7); holding this, therefore, to be a fact, there appear in this case to be two grounds which constitute a valid marriage by the law of Scotland: first, it appears from the Exhibits, No. 1 and No. 2, the last dated 28th May, 1804, that mutual promises of marriage were interchanged between the parties; that these were followed by *concubitus* or a copula, which, in the Deposer's opinion constitute a marriage by the law of Scotland. That this was the state of parties, is confirmed by Mr. Dalrymple's letters, from No. 3 to No. 9 inclusive, the tenor and strain of which, and various expressions used therein, denote that Mr. Dalrymple conceived he

had entered into the fixed relation of marriage with Miss Gordon: deposes, that besides the above, there is a second ground by which in the Deposer's opinion an effectual marriage betwixt these parties has been constituted according to the law of Scotland; by the annexed Exhibit, No. 10, dated 11th July, 1804, the Defendant declares and acknowledges Miss Gordon to be his lawful wife, and in this declaration Miss Gordon concurs by her engagement of the same date; and although she thereby promises that nothing but the greatest necessity shall force her to declare her marriage, that does not appear to the Deponent to weaken the case; the reason for concealing their marriage being, in his opinion sufficiently accounted for by the subsequent letters No. 13, 14, and 15, from the Defendant to the Plaintiff; deposes, that the above written declaration of the parties, expressed in unequivocal terms, and it must be presumed deliberately made, in his opinion, independent of all other circumstances, constitutes an effectual marriage; for he holds, that according to the law of Scotland, a marriage is completely established where consent is deliberately given; more especially, when expressed in a written acknowledgment or declaration *per verba de præsenti*, bearing that the parties are *eo-ipso* husband and wife: the Deponent is of opinion, that such a declaration constitutes a marriage by the Scot's law; though there should be no *concubitus*; but that point does not here come into question, as he holds, according to the statement in the case, that *concubitus* or a copula has taken place. And he must further observe, that the constitution of a marriage betwixt these parties as above mentioned, is confirmed by various expressions in the Defendant's letters to the Plaintiff, subsequent to his declaration, namely, Nos. 12, 13, 14 and 15; in which, besides addressing her as his wife, and subscribing himself as her husband, he expressly refers to the connection that has been established, pointing out at the same time the necessity that existed for its being concealed. Deposes that in giving this opinion he has paid attention to the writers upon this branch of the law, and to the various reported cases which are consequently well known. But his opinion upon this

point has been much confirmed by a decision pronounced by the Court of Session, upon the 13th June, 1792; Elizabeth Ritchie against James Wallace, which has not been reported. The Deponent was counsel in that case for Elizabeth Ritchie, and has recently refreshed his memory by perusing the printed pleadings now in his possession. The circumstances were shortly as follows; Elizabeth Ritchie became pregnant to Wallace, who, some months after, gave her an acknowledgment in his hand-writing in these terms: "January, 1785, I James Wallace, son to John Wallace, of Wallace Grove, do hereby acknowledge that you, Elizabeth Ritchie, daughter to Alexander Ritchie in Drumbey, is my lawful wife; and will solemnize the marriage regularly between us in the terms of the rules of the church, as soon as convenient for us; and I am your loving husband, signed, James Wallace. To Elizabeth Ritchie. Witness, Janet Telfer." Wallace denied his ever having written this acknowledgment, but it appeared from various circumstances to be genuine: Elizabeth Ritchie founded on it as a declaration *de præsenti*, constituting a marriage; which conclusion, in point of law, Wallace controverted; but the Court, by a majority of six judges to three, as appears from the Deponent's notes upon the papers, sustained the sentence of the Commissaries, which had found the acknowledgment libelled upon, relevant to infer marriage betwixt the parties,

R. HAMILTON.

The same Witness examined on the Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, That the law of marriage in Scotland has for a long period been clear and decidedly fixed. It is laid down by Lord Stair, (Edition 1681 pages 30 and 76,

and Edition 1693 pages 25 and 424) that marriage consists in the present consent, whether that be by words expressly, or tacitly by cohabitation or acknowledgment, or by natural commixtion, where there has been a promise or espousals preceding; for therein is presumed a conjugal consent *de presenti*. This was the law then, and the Deposer holds it to be the law at this day, and is of opinion that it has not been shaken or altered by any of the cases that have since occurred, such as those of M'Innes against More, White against Hepburn, Taylor against Kello, M'Laughlan against Dobson, or M'Gregor against Campbell, which were all involved in special circumstances; whilst on the other hand, the law as laid down by Lord Stair and Erskine, Book 1st, Tit. 6, § 2, 3, 4, 5, has been recognized and confirmed by various cases; particularly by those of Inglis against Robertson in 1786, Ritchie against Wallace in 1792, of Edmonstone against Cochrane, in 1804, and Walker against M'Adam in 1807.

2. To the second of the said Interrogatories this Respondent answereth and saith, That the Scots law of marriage is ascertained and rests, 1st upon legal principles, in respect it is a consensual contract. 2dly, upon the authority of our law-writers, referred to. 3dly, upon the judgments pronounced by the Court; and it is upon these that the Respondent has formed and given his opinion.

3. To the third of the said Interrogatories this Respondent answereth and saith, That there certainly is a material difference betwixt an obligation or promise to marry, and an actual marriage; a promise of marriage, *rebus integris*, may be resiled from; but if followed by a copula or consummation, a marriage, as formerly mentioned, is thereby constituted.

4. To the fourth of the said Interrogatories this Respondent answereth and saith, That an irrevocable obligation, by which he understands a written promise to marry delivered to a woman, will not be in all cases binding upon or tie up the woman from marrying another man. In the event of such a promise, there is *rebus integris* no marriage, so that either

party may draw back, leaving it to the party injured to seek such redress as the law will afford by an action for breach of promise.

5. To the fifth of the said Interrogatories this Respondent answereth and saith, That he conceives that a woman who has received such a promise, is entitled to call upon the man in the proper court, at any subsequent period, to fulfil it; but as such a promise, provided matters were entire, would not constitute a marriage, the man might draw back, leaving to the woman her action for breach of promise: circumstances might no doubt occur, which might take away the woman's right to demand the enforcement of the man's promise to marry, if for instance, she was herself to marry another man, or if she was unequivocally to concur in, or consent to, the man's marrying another. This answer is given upon the supposition, that there has been a promise merely, but *de facto* no marriage, for if that promise has been followed by a copula, a marriage is thereby constituted, which no circumstances or length of time can annul; and which the woman, accordingly may at any subsequent period demand to be declared in the proper court. If a man has made a promise, and is uncertain from the circumstances which have occurred whether or not he has involved himself in a marriage, his remedy is by an action of Jactitation of Marriage, or of "putting to silence," as we call it in the Consistorial Court, the result of which will decide whether he is bound or free.

6. To the sixth of the said Interrogatories this Respondent answereth and saith, That he is of opinion, that as a promise of marriage to a particular woman, followed by a copula, both events occurring in Scotland, constitutes a marriage by the law of Scotland, the man to whom these circumstances applied, must be held as married, in whatever country he may go to; and that he could not legally marry another woman in England or any where else. If such a man, from the woman's not insisting, was in dubiety as to the state he was in, his proper course would be to bring an action of putting to silence, as above-mentioned.

7. To the seventh of the said Interrogatories this Respondent answereth and saith, That a declaration in writing, given by a man to a woman, that she is his lawful wife, is not merely an obligation to marry, but is, when attended with the woman's acceptance and consent *de præsenti*, the valid constitution of a marriage.

8. To the eighth of the said Interrogatories this Respondent answereth and saith, That in the case supposed of a copula or consummation, either before or after such a declaration, a marriage, it is thought, would certainly be constituted, nor would the circumstances mentioned constitute an obligation only upon the man to complete the marriage.

9. To the ninth of the said Interrogatories this Respondent answereth and saith, That a declaration in writing, such as here supposed, constitutes as already observed, a marriage, not merely an obligation to marry, and a correspondence such as is figured, as it would evince the understanding and belief of the parties, would confirm the idea as to the existence of a marriage between them.

10. To the 10th of the said Interrogatories this Respondent answereth and saith, That if the man or woman who had given and received a declaration of a marriage, should thereafter express doubts as to the validity of such a declaration to constitute a marriage, or fears of being deserted, such expressions would, no doubt, be taken into account in explaining the intention of the parties at the time the written declaration was made; but unless such expressions indicated and inferred that there had been no marriage in view, intended, or entered into, so that the declared consent was thereby controverted and overruled, the Deponent is of opinion that the expression of such doubts or fears by either party, which might be the result of misconception, could not destroy the effect of an explicit acknowledgment or declaration of a marriage. But it is hardly possible to answer this query pointedly, or in more precise terms, unless the circumstances or expressions alluded to were more particularly detailed.

R. HAMILTON.

The same Witness examined on the additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said additional Interrogatories this Respondent answereth and saith, That he is of opinion that Sir Thomas Craig, lib. ii. dieg. 18, § 17, *et sequent.*, where he treats of legitimate and illegitimate children, has delivered substantially what he is bound to presume was the Law of Scotland, as to marriage, at the time he wrote; according to that author, it appears that the essentials of a marriage existed, provided *sponsalia*, or a promise had preceded a *concubitus* or consummation. It has indeed been conjectured, from what Craig says of the case of Edward Younger, that such circumstances conferred only a right of action to have the marriage solemnized, and he accordingly mentions that to that effect the mother had prevailed before the commissaries; but it appears from what immediately follows, that though Younger had refused, these judges nevertheless held that there had been a valid marriage, and gave effect to it accordingly. This proceeding seems to be very little different from the present law and practice, where a marriage constituted by a promise and copula, requires, like other irregular and clandestine marriages, a declarator as judicial evidence of the fact. And whatever upon this point may have been Craig's idea, the Respondent is of opinion, that the Law of Scotland has for a long period acknowledged that a promise, followed by a copula, does not merely furnish grounds for enforcing marriage, but does actually constitute one. That Craig treats of other points, namely, what effect is to be given to a marriage while a prior one has been entered into and is subsisting, and gives his opinion that the *bona fides* of one of the parties, though not sufficient to confirm the marriage, will nevertheless be effectual to legitimate the offspring, though not so, if both parties are in the knowledge of the prior marriage; but the Respondent doubts very much, if children born in such

circumstances could ever be regarded as legitimate, and is of opinion, that by the Law of Scotland as it now stands, they would not. He further answereth, that Craig is not upon points of this nature, of the highest authority in the Law of Scotland; they are not those upon which he professedly treats, and his opinions have not the same weight as those of Lord Stair and other subsequent writers.

2. To the second of the said additional Interrogatories this Respondent answereth and saith, that the doctrine laid down by Lord Stair in the passages referred to in this query, must be presumed to have been agreeable to the Law of Scotland in 1693, when the edition referred to was published. That it is further upon the whole agreeable to the Law of Scotland as it stands now, except that it appears to be now more firmly established that a promise and subsequent copula constitute a valid marriage. That more particularly, and in answer to that part of the query, viz. if the Law of Scotland has changed since the time of Lord Stair, and if so, What has introduced such change? the Respondent answereth and saith, It appears to him, that with a very few exceptions of dubious import, the Law of Scotland that a promise, followed by a copula, constitutes a marriage, has come to be permanently fixed and established. For it appears that both Sir John Nisbet, of Dirleton, who was advocate to King Charles the Second, and Sir James Stewart, who was advocate to King William and Queen Mary, were of opinion (*voce sponsalia*) that a promise, followed by *concubitus*, made an effectual marriage. Two cases are reported in the Dictionary of Decisions, vol. ii. page 288; the first, 19th July, 1670, Cockburn, the second, 19th February, 1732, Harvie, which seem to infer, that a promise of marriage and subsequent copula made an effectual marriage: the case, 15th July, 1696, Hislop contra Kerr, reported by Fountainhall, and referred to in the case, 1st December, 1749, Linning contra Hamilton, appears, no doubt, to be somewhat adverse to this doctrine; but the Respondent observes, that this was not an action for declaring a marriage, but for damages, and there-

fore he thinks it to be presumed, the woman Hislop was conscious that she could not establish such a promise of marriage as would enable her to prevail in an action of that nature, which idea is countenanced by the circumstances and opinions stated in the report. That this is not at any rate a decision, that a promise and subsequent copula did not constitute a marriage; and although it had, the Respondent does not think it could be held sufficient to overrule the prior and subsequent adjudged cases and authorities. That the other case of Agnew, referred to in the decision of Linning contra Hamilton, instead of being adverse, seems to confirm this doctrine. That the Respondent has examined the printed pleadings in the case of Linning, (Sessions Papers, in Advocates Library, Kaimes' remarkable decisions, No. 100,) and from these it appears, that Castlelaw, the woman, insisted against Agnew for a marriage, and in support of it alleged a promise and subsequent copula; no doubt appears to have been entertained of the relevancy of these grounds, but she failed in the proof; for having referred the promise to Agnew himself, he swore negative, upon which the commissaries found "that the defender's oath does not prove a direct promise of marriage previous to the *concubitus*;" and therefore assoilzied from the process of adherence, &c. To this sentence, the Court of Session, upon the 1st January, 17 $\frac{1}{2}$ $\frac{9}{10}$, adhered: so that foiled in her action for a marriage, she was contented to take, and Agnew to pay, damages. That the case of 1st December, 1749, Linning contra Hamilton, and various other cases subsequent, appear to affirm the legal doctrine as to a promise and subsequent copula: The pursuers' action in that case, which was at first for a marriage, was chiefly founded upon the allegation of a promise of marriage followed by a copula; which infers, that such grounds were relevant: upon a reference to oath, the defender denied the promise, which ended the question of marriage, so that the pursuer proceeded in her action of damages. But if the promise had been proved *scripto vel juramento*, the Respondent has not a doubt that the pursuer Linning would

have prevailed in establishing the marriage ; that then came the case, Pennycook and Grinton contra Grinton and Graite, where the question was expressly decided ; and the same doctrine is confirmed by the case, 26th November, 1755, Smith contra Grierson, in the Faculty Collection, from the report of which it is clearly to be inferred, that a promise and copula sufficiently constituted a marriage by the Law of Scotland ; the only legal point which occurred being as to the mode in which the promise was to be proved, which it was found could be done only by the defender's writing or his oath. That the same doctrine seems to be taken for granted in the argument on the case, 20th December, 1781, M'Innes contra More, where it is stated as one of the modes of constituting a marriage. It is likewise inferred in the case, 18th November, 1785, White contra Hepburn ; and in the case, 15th June, 1792, Ritchie contra Wallace, referred to in the Respondent's deposition in chief ; The Respondent observes, from the notes of the judges opinions, that the late Lord Justice Clerk M'Queen stated a promise and copula as one of the modes of constituting a marriage. In the case of Kennedy contra M'Dowell decided in 1800 but not reported, the pursuer's chief ground of action for establishing a marriage was a promise and subsequent copula : but though she failed in establishing these precise circumstances, and of consequence in making out her marriage, no doubt, the Respondent understands, was entertained by the commissaries or the Court of Session, as to the relevancy of a promise and subsequent copula, to constitute a marriage. That in the argument in the case, 15th May, 1804, Edmonstone contra Cochrane, and in that of March 4th, 1807, Walker contra M'Adam, it is stated and avowed by both parties, that a promise and subsequent copula was one of the modes of constituting a marriage by the Law of Scotland. That these are the authorities which in the Respondent's opinion appear to have confirmed the Law of Marriage, as laid down by Lord Stair.

3. To the third of the said additional Interrogatories this

Respondent answereth and saith, That he is of opinion, that the decision in the case of Pennycook contra Grinton, 15th Dec. 1752, if an extension of the doctrine laid down by Sir Thomas Craig was nevertheless agreeable to that laid down by Lord Stair, and to most, if not to all, of the previous authorities the respondent is in the knowledge of, and which have been noticed above; it farther appears to him from the report, that this case was decided upon the general point, and that whether the woman, namely, Graite, had been in *bond fide* or not, that the decision would have been the same as was given, and her marriage consequently annulled.

4. To the fourth of the said additional Interrogatories, this Respondent answereth and saith, That he has already mentioned the cases he is in knowledge of, which seem to apply to the present question, but others may have occurred in the Commissary Court.

5, 6, 7. To the fifth, sixth, and seventh of the said additional Interrogatories this Respondent answereth and saith, That the Court of Session is not he conceives bound by former decisions, if these are in principle iniquitous or unjust; if doubts are entertained of any point of law or decision, as to its being unsound or not to be followed as a precedent, the court is certainly at liberty to review it either by a hearing in presence, or in some such solemn manner, so as by a deliberate judgment, to fix the point in future.

8, 9. To the eighth and ninth of the said additional Interrogatories this Respondent answereth and saith, That he is of opinion that the case of Grinton is one of authority, fixing the general point, as the report bears "that it was held for law, that a promise of marriage followed by a copula made from that moment an actual marriage." The principle there laid down appears moreover to be confirmed by the discussion that has occurred in the various cases already mentioned; and although the court might no doubt order a hearing in presence, for reviewing the principle of that decision, the Respondent would doubt very much, and would indeed have little expectation of its being altered.

10. To the tenth of the said additional Interrogatories this Respondent answereth and saith, That writings produced by a party asserting a marriage, though after the other party has intermarried with another, will nevertheless, the Respondent conceives, receive such effect as is due to them upon their own merits.

11. To the eleventh of the said additional Interrogatories this Respondent answereth and saith, That he conceives that in the case supposed in this query, the pretensions of the party who had ostensibly intermarried with a person previously married in consequence of a promise followed by a copula would not be sustained, and of course as the first would be a valid marriage the second formed connection would not be regarded.

12. To the twelfth of the said additional Interrogatories this Respondent answereth and saith, That he conceives that the Defendant being a domiciled Englishman in Scotland upon military service, did not impede his contracting while in Scotland a valid marriage by the law of Scotland, and if he contracted such a marriage in Scotland, either by mutual declaration *de præsenti*, or by a promise and subsequent copula, his publicly marrying Miss Manners in England before the present action was instituted, can have no effect upon the validity of his previous marriage.

13. To the thirteenth of the said additional Interrogatories this Respondent answereth and saith, That officers on military service in Scotland, though in relation to questions of succession they may be held domiciled Englishmen, may without any solemnization or contract of marriage, form connections with women which will be a marriage, namely, by declarations of marriage *de præsenti*, by a promise and subsequent copula, and by the other modes in which an irregular marriage in Scotland is constituted.

14, 15, 16. To the fourteenth, fifteenth, and sixteenth, of the said additional Interrogatories this Respondent answereth and saith, That as the cases pointed out in these Interrogatories have not, so far as the Respondent knows, ever occurred or been decided, he cannot venture to give a po-

sitive opinion upon them; if the parties were domiciled in Scotland, he is inclined to think that in either case supposed a marriage would be constituted. But he entertains great doubts and uncertainty as to what might be the result, if the parties were in no respect subjected to Scottish domiciliation.

17. To the seventeenth of the said additional Interrogatories, this Respondent answereth and saith, That letters by a domiciled Englishman in England, to a woman in Scotland, expressing consent to a marriage *de præsenti*, would not, the Respondent apprehends, be sufficient to constitute a marriage by the Scots law; but that such letters would assuredly be taken into account as evidence of a marriage asserted to be contracted in Scotland.

18. To the eighteenth of the said additional Interrogatories this Respondent answereth and saith, That he is not aware of any distinction in the law of Scotland between a marriage actually constituted, and a promise of marriage followed by a copula, which he conceives to be the import of this query in relation to "an obligation to marry which cannot be retracted in respect that *res non sunt integræ*," these last circumstances as already so often mentioned, constitute a valid marriage awaiting like all other irregular and clandestine marriages a declaratory sentence of the Consistorial Court; (but with retrospective operation,) as the appropriate judicial evidence to the effect. That the Respondent therefore thinks that all such irregular and clandestine marriages stand upon an equal footing, and that in relation to them, there is no obligation of an intermediate class, leaving both parties at liberty to contract another marriage, and that such intermediate obligation is referable only to a promise of marriage, without a copula, which *rebus integris* may be resiled from.

19. To the nineteenth of the said additional Interrogatories this Respondent answereth and saith, That he conceives that by the law of Scotland an obligation or promise to marry may be retracted or departed from *rebus integris* as already noticed, leaving to the party injured their action

of damages. That he does not understand, that by the law of Scotland damages in such cases would be allowed abstractly for the breach of promise and consequent affront, but if the party injured can shew actual loss or damage incurred in consequence of the retraction of a promise, a compensation upon that account will be allowed.

20. To the twentieth of the said additional Interrogatories this Respondent answereth and saith, That it appears to be anticipated, the respondent having given his opinion that where a promise of marriage has been made and a copula has followed, a marriage is thereby constituted; so that in the event of retracting, payment of damages will not suffice.

21. To the twenty-first of the said additional Interrogatories this Respondent answereth and saith, That he is of opinion, that in holding a promise and subsequent copula to be the constitution of a marriage by the law of Scotland, the equitable and moral principle is taken deeply into account; but he does not imagine that this is the only ground for holding that these circumstances constitute a marriage; that the inferred consent never is, he conceives, to be lost sight of: and it appears to him, that Mr. Erskine in the passage referred to, B. I. T. vi. S. 4, though he does not state the law of marriage so fully as might be, yet, nevertheless states it with truth and correctly.

22. To the twenty-second of the said additional Interrogatories this Respondent answereth and saith, That if a promise of marriage has been legally proved, *scripto vel juramento*, and a copula has followed, the Respondent is not aware of any means by which the essentials thereby established in constituting a marriage (whether it is the presumed consent *de præsenti*, or the moral principle that is considered) can be rebutted; if these facts are proved, a marriage is fixed; so that there is in his opinion an end of the question.

23. To the twenty-third of said additional Interrogatories this Respondent answereth and saith, That where a woman has given a promise of marriage, and a copula has followed, and the man alleges a marriage, and of

consequence a consent upon his part *eo momento*, a marriage the Respondent thinks, is established: but if it is the woman who alleges a marriage, there will be this defect in the case supposed to constitute a marriage, namely, that the man has not promised or consented: and in these circumstances it is accordingly thought, that as there would be a lack of mutual consent to marry, there would of course be no marriage. That the Respondent must however observe, that as he does not know of any such case having been decided, he gives this opinion with caution; and it at the same time appears to him, that the discussion of these hypothetical cases, evinces, that the consent of parties is in all these and similar circumstances one of the main and ruling principles for deciding a question of marriage.

24. To the twenty-fourth of the said additional Interrogatories this Respondent answereth and saith, That he is of opinion that this doctrine, as to the constitution of marriage, is not radically contradictory to the substance of the doctrine stated by Sir Thomas Craig. If there is any difference, it rests not upon the essentials in the constitution of a marriage, but in the form merely of declaring it, and whether or not a previous action is necessary. But the doctrine stated, is, the Respondent conceives, agreeable to the authority of Lord Stair, which is justly considered as of great weight in the law of Scotland. The work of that author does perhaps contain some errors, but it is more to be depended on, than that of any other; and if there is any omission in the passages in his work, relative to the law of marriage referred to, it is, in not adverting to the moral principle assuredly to be taken into account, in judging of, and holding a promise and subsequent copula to be the constitution of a valid marriage; Lord Stair, it is true, does not refer to any case in support of the above position, excepting that of Younger be considered as one, (*vide* edition, 1693, page 426.) But the Respondent conceives that his opinion is sanctioned by the soundness and equity of the principle and the analogy which the case bears to the constitution of a marriage by mutual consent *de præsenti*, and independent of these views,

Lord Stair probably had the Canon Law in his eye, by the *decretalia Gregorii*, of which, lib. 4. tit. 1. cap. 30, it is said, “*is qui fidem dedit mulieri super matrimonio contrahendo carnali copulâ subsecutâ, si in facie ecclesiæ ducat aliam et cognoscat, ad primam redire tenetur, etc.*” the opinion of this author is accordingly entitled to much consideration, and no doubt, it is conceived, can be entertained of the fidelity with which that opinion has been transmitted, as it is contained in the two first editions of his work, both of which were printed in his own lifetime: the second in 1693, professing to be a correction of the first, in 1681, by his Lordship himself.

25, 26. To the twenty-fifth and twenty-sixth of the said additional Interrogatories this Respondent answereth and saith, That contracts of marriage entered into in Scotland bear in general and it is probable uniformly, that the parties accept of each other for their lawful spouses, or as Dallas has it, page 724, *et sequen*, for their lawful future spouses; importing thereby consent *de præsentî*: but then these contracts further bear, that the parties are to solemnize such marriage in the face of the church, and thence it is held, Erskine, p. 90, that such contracts do not constitute a marriage, but may be resiled from, leaving to the party their action of damages for any loss that may have been sustained in consequence thereof; such contracts are usually subscribed in presence of the relations of the party, who most frequently also subscribe it as witnesses, but they are entirely different and altogether distinct from the exhibits annexed to the present case, which, in the Respondent’s opinion, constitute a clandestine though an efficient marriage, excluding in their intention such formal preliminary which is of a public nature, and in like manner all ceremonies and solemnities in the face of the church: as such declarations constitute, as the Respondent conceives, an effectual marriage *instante*, they cannot be retracted, and much less so, if, as is stated to be the fact in the present instance, there has been a copula or concubitus.

27. To the twenty-seventh of the said additional Interro-

gatories this Respondent answereth and saith, That he is of opinion that in consequence of the exhibits annexed to the libel, namely, the promise to marry and the mutual declarations of marriage *de præsenti*, which were given, and if it be the fact, as is affirmed, that concubitus followed, neither of the parties could retract or free themselves from a marriage, independant altogether of any actual celebration of it.

28. To the twenty-eighth of the said additional Interrogatories this Respondent answereth and saith, That he is further of opinion, that by these exhibits and the alleged copula, (which if it is denied must be proved) the Plaintiff was bound to the Defendant in a valid marriage; it was consequently in his power to claim her as his wife, and to require her adherence; and in the event that the Plaintiff had destroyed the exhibits in her possession, if the Defendant had in his possession a duplicate of the mutual declaration, that would be sufficient to prove and constitute the marriage; and if he had not such duplicate, he would have been entitled to her oath as to the prior existence of such exhibits, and to the import of them whether they did not contain a promise of marriage and declaration *de præsenti* of such an engagement: either of which being established in the affirmative, would in like manner as now that they are in existence, constitute a marriage.

29. To the twenty-ninth of the said additional Interrogatories this Respondent answereth and saith, That he has either now or formerly noticed all the cases appearing to be material and applicable upon the law of marriage, which he is acquainted with. In the case of Ritchie contra Wallace, in 1692, which was decided upon a declaration *de præsenti*, matters were in certain respects entire, the copula having preceded the acknowledgment; but this circumstance was not held as altering the case, or as diverging it from the rule of law that the mutual consent of parties declared *de præsenti*, constituted a marriage.

30, 31. To the thirtieth and thirty-first of the said additional Interrogatories this Respondent answereth and saith, That

if parties were to enter into a contract of marriage, and a copula or concubitus was thereafter to take place, so that matters were not entire, a marriage it is thought would be constituted. In like manner, as in the case where there had been a promise and subsequent copula; and as a valid marriage would in these circumstances be constituted, so the Respondent does not imagine that any subsequent connection of that nature, which the man might attempt to form, could have the result of an effectual marriage. That the woman clandestinely married, might be highly to blame in concealing or seemingly foregoing her right, but that conduct could not justify or excuse the man, or place him absolutely in *bonâ fide* to contract a second marriage; nothing could place him in security, and consequently in *bonâ fide*, but a decree of putting to silence in an action of jactitation of marriage; and although a grievous misfortune might thus fall upon an innocent woman who had been ensnared by the falsehood of the man, no feeling for her mischance can, in the Respondent's opinion, be set up to overturn a marriage previously constituted, and to bastardize the issue, if any, in favour of what was from the first in consequence of the man's incapacity to contract a legal marriage, nothing more, however much the injured female might deserve commiseration, than an illicit connection.

R. HAMILTON.

The same Witness examined on the further additional Interrogatories, given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said further additional Interrogatories this Respondent answereth and saith, That he has paid particular attention to the case reported by Falconer, 28th July, 1747, Campbell contra Cochrane, and to the ultimate result in that case subsequent to the point reported. The point

adjudged by the Court of Session is thus noticed by Falconer in his Index, *voce—Fraud*:—"A woman alleging a private marriage with a person deceased, who during his life had lived publicly with another in her sight, was repelled *personali exceptione* from proving her marriage to the prejudice of the other and her issue." The Court of Session, by Interlocutor of the 28th July, 1747, remitted with an instruction to the Commissaries "to find that Mrs. Kennedy was barred *personali exceptione* from being admitted to prove that she was married to M. Campbell, of Carrick, before he was married to Mrs. Jean Campbell," so that the sentence of the Commissaries who had allowed Mrs. Kennedy to prove her marriage was altered; but this point was appealed to the House of Lords, and upon 6th February, 1748, the Interlocutor of the Court of Session was reversed, and that of the Commissaries which had allowed a proof, sustained: that the Deposer has found this to be the fact from the appeal cases of these parties appointed to be heard in March 1752. It is indeed said in the case of Mrs. Jean Campbell, that the Interlocutors complained of were reversed by consent of her counsel, but it is however certain that the question returned to the Court of Session and the Commissaries when the Interlocutor allowing Magdalene Cochrane or Kennedy a proof of her marriage, was followed out, a proof accordingly taken, and upon the 25th January, 1751, the Commissaries found that Mrs. Magdalene Cochrane had not proved her prior marriage libelled, and therefore dismissed her process, and found in favour of the marriage of Mrs. Jean Campbell and the legitimacy of her daughter. This sentence was also submitted to the Court of Session, and thereafter was appealed to the House of Lords, and was affirmed. That in adverting therefore to this case, it must be remembered that the point reported by Falconer, namely, that Mrs. Cochrane was barred *personali exceptione* did not ultimately stand, she being allowed to prove her marriage; and this, the Deposer conceives is agreeable to the law of Scotland as it now stands. Mrs. Cochrane, as the Commissaries found, did not prove her prior marriage, and though the circumstances in which she

was placed appear from the appeal cases referred to to have been extremely hard, those on the other hand which in the Respondent's apprehension were the most adverse to her, (supposing they are correctly stated in the cases) were that Mrs. Cochrane had by her conduct upon different occasions several years subsequent to her alleged marriage treated Mrs. Jean Campbell as Captain Campbell's wife, thereby acknowledging her as such. That the Respondent is aware that this fact might have had much weight in the comparative estimation of the proof brought by the parties, in so far as it might perhaps from thence be inferred, that such conduct betrayed a consciousness upon Mrs. Cochrane's part that she was not Captain Campbell's wife. The Respondent conceives that the decision upon the first point in the above case is so far applicable to the present one, that the Plaintiff is not barred *personali exceptione* from proving her alleged prior marriage with the Defendant: but it is impossible for him to say, whether the decision upon the second point in the above case is in any respect applicable to the present question, as he is not put in possession of all the circumstances that may have taken place between the Plaintiff and Defendant subsequent to her alleged marriage, and in particular, he does not know whether or not she has acknowledged Miss Manners as the Defendant's wife.

2, 3. To the second and third of the said further additional Interrogatories this Respondent answereth and saith, That as he has adverted to the cases referred to in his answer to the second of the additional Interrogatories, it is only necessary to observe further, that these cases do not, in his opinion, prove that either in the year 1696 or 1749, a marriage resting upon a promise and subsequent copula could be defeated by another marriage entered into by the man as a *medium impeditum*; and it further appears to him, that the decision upon the first point in the case of Campbell contra Cochrane, is adverse to that doctrine.

4. To the fourth of the said further additional Interrogatories this Respondent answereth and saith, That he is well acquainted with this article of Lord Kames's Elucidations, but though it

is like all that author's writings, an ingenious argument, it is in some places incorrect ; particularly where he says, that a low woman may succeed in proving a promise *cum copula*, by witnesses of her own rank, which is not the law, as his Lordship may have known from the case 26th Nov. 1755, Smith contra Grierson. That it is impossible for the Respondent to say whether the circumstance of the subsequent marriage with Graite being a clandestine one, had, as Lord Kames insinuates, weight with the judges ; nothing of that kind appears from the report, which, as already mentioned, bears, that the case was taken up entirely upon the general point : and, as the Respondent holds it to be fixed law, that a promise and subsequent copula constitute a marriage, he does not think that Lord Kame's argument in a case similar to that of Grinton would be successful.

R. HAMILTON.

15 August, 1809.

Repeated and acknowledged at Edinburgh, before me the undersigned
WM. COULTER, Lord Provost.

In the presence of me, HARRY DAVIDSON,
Not. Pub. and Actuary Assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

7th June, 1809.

DAVID HUME, Esq. of the City of Edinburgh, Advocate, aged fifty-two years, a Witness produced and sworn deposes and says, That he has practised as an Advocate be-

fore the Supreme Court of Session in Scotland since 1780, and that he has occupied the Chair of Professor of Scots Law, and read lectures as such in the University of Edinburgh since December 1786; and further to the eleventh article of the said Libel he deposes and says, that he has attentively perused and considered the several Exhibits annexed to the Libel, and that in the law of Scotland marriage is considered as an ordinary civil contract which is completed by the interposition of the consent of parties, provided this take place unequivocally, seriously, and deliberately, and with a genuine purpose immediately to establish the relation of husband and wife, and not to engage only, or betroth themselves to marry, at some future time. That a marriage may thus be effectually made in Scotland, without the form of celebration by a clergyman, and without the use of any precise ceremony or solemnity even of a civil nature, and in any way wherein the explicit and mature consent of parties is gravely exchanged. That with respect to the evidence of the proper matrimonial consent having passed between the parties, the practice of the law of Scotland is not limited by strict or scrupulous rules, but allows the fact to be vouched or inferred in sundry modes of evidence, by public cohabitation, under the character, or as it is termed the habit and repute of man and wife; by writings of mutual acceptance as spouses *de presenti*, by mutual written declarations or acknowledgments of marriage, by a series of letters, such as in their contents and mode of address and subscription either express or virtually imply an acknowledgment of marriage; by verbal declaration also before a magistrate, or made on some suitable and serious occasion before creditable witnesses called by the parties for that purpose. That whether the writings executed by the parties are in the form of mutual and present acceptance of each other as spouses, or in that of a declaration of marriage as already made, is no wise material; for still such writings are evidence under the hand of parties, and to each against the other, that the just matrimonial consent has passed between them in substance though not in form. the voluntary execution of such declarations, is a virtual con-

sent of the parties as at that date to stand in the relation of married persons. That more especially, regard is paid to declarations or acknowledgments of marriage whether oral or written, where it appears that they have been followed with or accompanied by the parties' carnal knowledge of each other; not that such intercourse is regarded as the seal or accomplishment of the contract or indispensable to its validity, but as a material ingredient of evidence to shew that it was meant and understood between the parties, that they were actually man and wife from that time, and not engaged or under promise only. That it is however carefully to be observed with respect to all these several modes of evidence, whether oral or written, that they are liable to be controuled and expounded by other writings, if such there be, of a contrary import which have passed between the parties, or by facts and circumstances of a different tendency in the after conduct and proceedings of parties, whereby it becomes necessary for the judge to take a complex view of the whole case, and to determine on the whole series of evidence and circumstances, whether by the writings and acknowledgments which passed between the parties, they did or did not truly intend to become man and wife, and did or did not consider themselves as being in that relation to each other. That among other circumstances, which weigh in this point of view, the absence of carnal intercourse, is always one of some moment; but that although unfavourable to the plea of marriage, this circumstance, in the Deponent's opinion, is not of itself decisive, but may be made amends for by the other evidence in the case, and more especially where reasonable motives of prudence or the like can be assigned for such forbearance. That in illustration of the general principle above-mentioned, the Deponent may take notice of the following judgments which appear in the printed collections of reports, The case of Inglis and Robertson, 3d March, 1786, the case of Edmonstone contra Cochrane, 15th May, 1804, and the case of M'Adam contra M'Adam, 4th March, 1807, whereof the last was a case of mere verbal declaration; and that the Deponent has had occasion to observe sundry other judg-

ments to the same effect, which have not been reported: the case of Peggy Ferguson contra David M'Kie, (2d August, 1781,) being a case of verbal declaration, that of Elizabeth Richardson, contra John Irving, (3d August, 1785,) that of Elizabeth Ritchie contra James Wallace, (13th June, 1792,) and that of Sibella Atkinson contra John Brown, (6th July, 1787,) being three cases of written declaration. That the Deponent does not consider the judgment of the House of Lords in the case of More and M'Innes, (25th June, 1781) nor the judgment of that House in the case of Taylor and Kello, (16th Feb. 1787) as in anywise to the impeachment of the leading principle of the law of Scotland respecting the constitution of marriage, for in both instances the judgment of the House of Lords is expressed in cautious and detailed terms, such as save the principle, and rest the decision on the particular circumstances of these cases, as yielding evidence in the case of More, that his declaration was meant as a blind only to the world to protect the woman during her pregnancy, and in Taylor and Kello's case that the writings were not intended by either party, or understood by the other as a final agreement. That the Deponent regards in the same light the case of M'Laughlane and Dobson, 6th December, 1796, where the conduct of parties had been variable and contradictory, and no carnal intercourse had taken place: deposes, that by the law of Scotland marriage may also be effectually contracted by means of a mere promise of marriage, *subsequente copulâ*, the law presuming in these circumstances (such is the language of systematic authors and recognized in practice) that the carnal intercourse is accompanied with the exchange of the proper matrimonial consent *de præsenti*, and takes place in reliance on it. That agreeably to this principle the effect of copula following on a promise is not merely to bind the promise and beget an effectual obligation to marry, but to make an actual marriage from the time of the copula, to the effect of disabling both parties from contracting any other marriage; and that in the case of Pennycook contra Grinton and Graite, (15th Dec. 1752,) a marriage celebrated by a clergyman and followed with procreation of a child, was an-

nulled accordingly in respect of the man's prior marriage to another woman the pursuer, which was constituted by promise and copula only; that applying these principles to the present case the Deponent is of opinion that the mutual acknowledgment of marriage in the Exhibit, No. 2, and the renewed acknowledgment in the Exhibit, No. 10, accompanied with carnal intercourse between the parties proved or admitted, and the various acknowledgments express and implied in the Defendant's several letters, the other twelve Exhibits, do constitute a valid and effectual marriage by the law of Scotland. The said Exhibits, No. 2 and No. 10, being evidence under the hand of the parties, and to each against the other, that the proper matrimonial consent making them immediately man and wife, had passed between them; and these writings being themselves virtually and in substance the exchange of such consent *de presenti*. That the Deponent does not discover any sufficient grounds for considering the said declarations, No. 2 and No. 10, otherwise than as serious and deliberate, and intended immediately to establish the relation of husband and wife between the parties; and more especially this purpose and understanding of the parties may be inferred from the circumstances, if proved or admitted, of carnal intercourse having taken place in pursuance of those declarations; and further that the series of letters from the Defendant bearing repeated and strong acknowledgments of marriage, both express and implied, mark a settled resolution and habit of mind on the subject, and not a transient or wavering purpose only; that the Deponent observes that in some of the letters, especially in Nos. 5 and 6, some expressions are interspersed which may seem to savour in some measure of an understanding on the Defendant's part that he was under promise or engagement only, but these are outweighed by earnest and more pointed contrary declarations in the same and other letters, and more especially by very serious ones, in Nos. 13 and 14, and further that these loose and equivocal words seem to relate to the Defendant's promises and engagements to make a public acknowledgment of his marriage as soon as might be, and are also probably accounted for on this footing that the marriage

was private, and the documents of it under the power of the Plaintiff, and that the parties were imperfectly instructed in the law of the case, so as not to know whether it might not be possible to dissolve and undo the connection by mutual consent, or by the Plaintiff's destroying the written evidence of it in her possession. But that on the whole series and contents of the letters, they do appear to the Deponent not to invalidate or counteract the Declarations, No. 2 and No. 10, but rather to vouch the Defendant's understanding that he was irrevocably married thereby, and his consent so to be, if the law permitted it to be done in that fashion. That the Deponent however thinks it proper to add, that if a process of declarator of marriage at the Plaintiff's instance, (and grounded on these several documents, were depending in the Consistorial Court of Scotland, or in the Court of Session there, the course of proceeding would be to compel the Defendant, Dalrymple the husband, to produce the letters by him received from the Plaintiff in return, and if such letters were produced and were found to contain assertions on her part of her freedom from the matrimonial tie, and an explanation of her understanding of the mutual acknowledgments of parties as having always been to promise and contract *de futuro* only—this might be sufficient to apply and expound these acknowledgments accordingly. That on the other hand if the Defendant being called on to produce the Plaintiff's letters, upon oath denied his receipt or possession of any such or alleged that he had lost or destroyed them, the case would then be determined on the documents exhibited for the pursuer. Further this Deponent deposes and says, that the mutual promise of marriage contained in the Exhibit, No. 1, being *de futuro* only, is not of itself sufficient to make a marriage by the law of Scotland, or even to beget a valid obligation to marry, but that the said written promise followed with carnal copula, proved or admitted, is sufficient in the law of Scotland to constitute a valid marriage from the date of such copula, so as effectually to disable both parties from contracting any other marriage, and this independently of the effect of the said Exhibits, No. 2 and No. 10, as an exchange or an evidence

of the proper and present matrimonial consent. That the said Exhibits, No. 2 and No. 10, supposing them not sufficient documents of an immediate marriage are however certainly at least equivalent to a renewed promise of marriage, and if followed either of them with copula proved or admitted, do, in like manner constitute a marriage, independently of the promise, No. 1.

DAVID HUME.

The same Witness examined on the Interrogatories given in behalf of John William Henry Dalrymple, Esq. the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, That he considers the constitution of marriage by the consent of parties seriously and *de præ-senti* interposed, as a genuine article of the common Law of Scotland from the period at least of the Reformation, and that he is not acquainted with any evidence of the priest's blessing having been reckoned indispensable in Scotland, (though it was regular [and laudable] even in the Catholic times. That the only variation of practice the Deponent knows of, is, that for the last twenty years or thereby there has been somewhat a greater readiness in the court to admit evidence in controul or explanation of the written declarations of parties.

2. To the second of the said Interrogatories this Respondent answereth and saith, That the law on this head is to be collected from the works of those authors who have written concerning the Law of Scotland, and from the decisions of the Court of Session, and of the House of Lords, in cases of marriage; and that the Deponent has formed his own opinion on these grounds accordingly.

3. To the third of the said Interrogatories this Respondent answereth and saith, That no such thing is recognized

in the Law of Scotland, as an irrevocable obligation to marry; that to be at all available, the consent to marry must be *de præsenti*, and the most solemn promise of marriage *de futuro* under the hand even of the party not only is not effectual to compel solemnization of marriage, or to authorize a decree of declarator of marriage in case of refusal to solemnize, but is not even a ground of action of damage *in solatium* of the disappointment, though it may ground a decree for such actual and patrimonial damage, (the expence, for instance, of wedding-clothes, and the like,) as the complainer can shew in the case. That though parties are thus at freedom *rebus integris* to fulfil or desert their promise of marriage, yet when copula follows in reliance on such promise, the law infers and presumes the exchange of the proper consent *de præsenti*, as at the time of the copula, and thus holds the parties are married from thenceforward, and disabled from contracting any other marriage.

4. To the fourth of the said Interrogatories this Respondent answereth and saith, That he has already said that *rebus integris* the most express promise of marriage is always revocable on either side, and in no wise hinders either party from contracting marriage with some other person.

5. To the fifth of the said Interrogatories this Respondent answereth and saith, That it is substantially answered in the answers to the third and fourth Interrogatories, and that the promise becomes void by the repentance of the party promiser, though he or she may not be able to allege any change of circumstances in justification or excuse.

6. To the sixth of the said Interrogatories this Respondent answereth and saith, That he cannot well make an answer, in matter of law, in terms so broad and indiscriminate as the Interrogatory seems to require, but with respect to the effect of a promise and copula taking place in Scotland, and with a woman native of Scotland and domiciled there, that in his opinion there is no room for distinguishing in favour of the man on the ground merely of his being a domiciled Englishman, and not possessed of any property or effects in Scotland, nor on the ground merely of his afterwards marrying an-

other woman in England. Further deposes, that he cannot give it as his opinion that in a competition between a marriage made by promise and copula in Scotland, and a marriage made afterwards regularly by the man in England, the validity of the former depends on the circumstances of the first wife having previously obtained a decree of the court declaring her marriage; and that it would not be just that any such prejudice to the right of the first wife, should follow on her delay to ask such decree, which delay may be owing to her entire reliance on the man's honour, or may be in compliance with his injunctions, or be matter of agreement between them for prudential reasons. That when obtained, such decree of declarator publishes only and executes and does not form the relation, and thus the decree draws back and attaches to the date of those facts that are the substance and bottom of the case, and on which the law grounds its presumption of a consent *de præsenti*. Deposits and says, that one question of some difficulty may however be imagined, in the case of the first wife being in the certain and special knowledge of the man's addresses afterwards to another woman, and by her silence and course of conduct decidedly acquiescing in his second marriage; and certainly in any case where the first marriage is doubtful, and matter of inference only from a number of collateral particulars, such acquiescence will go far against the woman, not as a renunciation of the state of wife or a bar *in limine* to her claim, but as matter of real evidence that she never had intended or understood herself to be the man's wife; and on this ground, in some measure, went the ultimate judgment in the case of Napier contra Napier, (Nov. 1800, and June 1801,) where a marriage regularly celebrated, and followed with the procreation of many children, was attempted to be set aside in respect of the man's alleged prior marriage, made by cohabitation only with another woman under the character of wife, which woman had acquiesced for years in the second marriage, though dwelling in the same town with the other parties: but that in the case of an explicit written promise of marriage, followed with copula,

which is not of the same ambiguous description, the Deponent sees great difficulty in the way of sustaining the plea of personal objection as in bar of the first wife, whose state once duly contracted is immutable, and cannot even expressly be renounced, and much less by any sort of implication; and this difficulty increases in the case of there being issue of the first marriage. That it is true the plea of personal objection was sustained in the Court of Session, in the case of Campbell of Carrick, 28th of July, 1747, where the first wife had lived for years in the neighbourhood and in the society of the second, but that judgment was reversed in the House of Lords, and the parties were sent to proof upon the case. That upon the whole, in the case of the man contracting a second marriage in England, while the first wife continued to reside in Scotland, and is thus presumably ignorant, or has had an imperfect knowledge of the man's addresses, the Deponent sees no sufficient reason, and knows no authority for sustaining the plea of personal objection against the woman.

7. To the seventh of the said Interrogatories this Respondent answereth and saith, That such a declaration if direct and explicit, is good evidence against the man under his own hand, that the proper matrimonial consent making the woman his lawful wife has already passed between them, as well as in substance, the delivery of such consent to the woman is the expression of his present consent to stand to her in that relation, and that it thus makes an immediate marriage.

8. To the eighth of the said Interrogatories this Respondent answereth and saith, That copula following on such a declaration, which is more than equivalent to a promise, is in that point of view sufficient to make a marriage by promise and copula; and that consummation accompanying such a declaration, whether before or after is a powerful ingredient of evidence in confirmation of the declaration, as importing an immediate marriage; and not an engagement only.

9. To the ninth of the said Interrogatories this Respondent answereth and saith, That as a marriage may be effectually constituted by means of a series of letters, as between husband and wife, so when such a correspondence follows on a written declaration of marriage, those two modes of evidence mutually strengthen each other, and take the case out of the notion of a mere engagement to marry.

10. To the tenth of the said Interrogatories this Respondent answereth and saith, That it has already been said in his deposition in chief, that written declarations of marriage how explicit soever are liable to be controuled and expounded by the correspondence of parties, or by evidence in the conduct and behaviour of parties tending to shew that it was not their meaning, nor was it so understood or agreed between them, that they were actually married. Further this Respondent saith, That such questions are very nice and circumstantial, and require a studied attention to all the expressions used by the parties in their letters, and all the possible meanings of those expressions and the motives of parties to use them. That the Respondent would not consider it as materially shaking a declaration of marriage, that the parties in their letters alluded to a purpose of future public celebration, this being matter of decency, and for better repute in the world, as well as for the quiet of the woman's mind, who, though fast bound in law, may still feel humble and uneasy as long as the priest has not done his office. That neither would the Deponent consider it as materially shaking a declaration of marriage, that either party afterwards expressed fears of desertion, the evidence of the marriage in such cases being under the power of the parties, and liable to accidents, and they, uncertain in some measure, concerning the decision of the Law upon their case, no matter how positive and serious their purpose may have been to be instantly married by the writing they exchanged.

DAVID HUME.

The same Witness examined on the additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said additional Interrogatories, this Respondent answereth and saith, That these five sections of Sir Thomas Craig's Treatise *de Feudis* appear to the Respondent to contain a good deal of desultory discourse concerning marriage and legitimacy, and that sundry somewhat rash opinions are given there upon speculative points, which had not been tried in Craig's time, and remain untried still, and are nice and open to difference of opinion. That Craig is however good authority for the case of Edward Younger related in the nineteenth section, being a decision given in his own time on the matter of marriage contracted by promise *subsequente copulâ*, and although it appears that the course taken in that instance, and probably the usual course taken at that time, was, that the court gave decree for solemnization of the marriage, yet, in the Respondent's opinion, this was directed by the consistorial court out of regard to civil order and decency, and for the sake of notoriety only, and not upon the notion that the state of parties was not already irrevocably fixed by the promise and copula: and, indeed, that in Craig's own opinion, neither the solemnization, nor the decree for it, was indispensable, and that the marriage was truly made by the promise and copula themselves, appears from the opinion he gives at the head of the nineteenth section, viz. That a child is lawful who is procreated after contract of marriage and proclamation of banns, if the father die before the appointed day of marriage. That to the Respondent, the notion of decreeing to solemnize a marriage, that is to say, compelling a person to give his consent out of love and affection, to live all his days with a certain woman, appears somewhat strange. That the decree cannot command the will of the man, and there is no species of diligence by which it can be carried into execution; and if the man is thus to be married

in the end, without the help of a true and real consent *de præsenti*, and by means of a feigned and presumed consent, it is more reasonable to apply that presumption to the time of the promise and copula, which are the bottom and make the justice of the case, than to the date of the decree which does but publish and declare these facts ; that the form of decreeing for celebration, has therefore been laid aside in later times as an unmeaning and unnecessary circuit, and this change of practice this Respondent considers as one in point of form, and not in the substance of the thing.

2. To the second of the said additional Interrogatories this Respondent answereth and saith, That Lord Stair's Exposition of the Grounds of the Law of Scotland respecting marriage by promise and copula, appears to the Respondent to be sound and correct, viz. That it proceeds on the presumption of things passing at the time of copula out of the state of promise *de futuro*, into that of actual marriage by consent *de præsenti*. That this, as the Respondent understands, is the established doctrine now, equally as it was in Lord Stair's time, and according to the Respondent's notes of the opinions of the judges in M'Adams case, the law was so delivered by Lord Meadowbank (13th Nov. 1806), "The notion of law is, that copula is the consummation of "a consent *de præsenti*, which is thence presumed. It is not "on the notion of barring *locus penitentiae*." That it is plain that Lord Stair himself did not understand his doctrine to be inconsistent with that of Craig ; for in the latter of the two passages referred to in this query, he founds upon Craig's authority, and the case of Edward Younger, and this in connection with his own principle of a presumed consent *de præsenti*. That in like manner, in the former passage, (Book I. Tit. iv. § 6,) and still in confirmation of his own principle, Lord Stair takes notice of a case in Nicholson's Collection, where the like course was taken of decreeing for celebration on the grounds of the man's written acknowledgments of marriage and his procreation of children ; that the Respondent understanding that, in both instances, the decree for celebration was given out of

regard to order and example only, does consider the authority of Craig as no wise inconsistent with the principle or reason assigned by Stair.

3, 4, 5, 6, 7, 8, 9. To the third, fourth, fifth, sixth, seventh, eighth and ninth of the said additional Interrogatories this Respondent answereth and saith, That the case of Frinton and Craite was argued by counsel of great eminence, and when very able judges sat on the bench; and the Deponent has always considered that judgment as having been deliberately given, and upon the general question of law, and not in respect of any specialty favourable to the woman pursuer, (such as the nonproclamation of banns) and as decisive therefore of the proper character and effect of a marriage made by promise and copula. That if the like question were to occur again in the Court of Session, the judges, in his opinion, ought not, and as far as the Respondent can judge, would not think themselves at freedom to depart from that precedent, or to reconsider the question on a hearing in presence, or in any other shape. That the only case, so far as the Respondent knows, in any degree of a similar nature, which has since been tried, is that of Napier contra Napier already referred to, in November, 1800, and June, 1801, but here the prior marriage was to be inferred from a cohabitation of a very ambiguous kind, between a soldier and a woman who followed the regiment, and which had ceased for five or six years before the second and public marriage; and that for upwards of twenty years that the second wife lived, (in which period she bore seven children) no claim was made by the alleged first wife, though dwelling in the same city with the couple, and the question of legitimacy was only brought forward at last, at the instance of a child, after death of both women; that in these circumstances there seemed to be strong presumptive grounds of evidence against the first marriage, and on that footing the case was finally decided against the claimant, though the first interlocutor was the other way, and bastardized the whole issue of the second marriage.

10, 11. To the tenth and eleventh of the said additional Interrogatories this Respondent answereth and saith, That he cannot make an answer to these queries further than he has formerly done, without a much more specific and detailed case, laying before him the whole history and particulars of both connections, and the situation and conduct of all parties; that according to the circumstances, the previous non-production of the writings by the party who founds on them, may or may not be a matter unfavourable to that party in the way of presumptive evidence, and that so it may also be as to the failure of such party to prevent or protest against the man's contracting of a second marriage.

12. To the twelfth of the said additional Interrogatories this Respondent answereth and saith, That he can give no opinion on this query, unless it were stated to him how far the Plaintiff was in the special and certain knowledge of the Defendant's intention to marry Miss Manners, and wilfully and inexcusably forbore to give notice of the impediment; and that even in the case of such wilful forbearance, the Respondent, as he has already answered, finds it very difficult to enter into the notion of renunciation of the state of wife, if once contracted in a plain and unambiguous way, as by exchange of acknowledgments, or by a written promise followed with copula. That if unattended with explicit acquiescence on the part of the Plaintiff, the circumstance of the Defendant having been in Scotland on military service, and having afterwards publicly married Miss Manners before the commencement of this action, could only be of weight as founding an inference, and this by no means a conclusive one, that the Defendant had not thoroughly understood his situation with the Plaintiff.

13. To the thirteenth of the said additional Interrogatories this Respondent answereth and saith, That he is not acquainted with any case of this description, and that the decision to be given on any such, cannot be matter of general rule, but must depend on the nature and circumstances of the connection of parties, the nativity of the man being one circumstance to be weighed along with others.

14, 15, 16. To the fourteenth, fifteenth and sixteenth of said additional Interrogatories this Respondent answereth and saith, That such cases might occur, attended with a great diversity of other circumstances, according to which the decisions might be also different.

17. To the seventeenth of the said additional Interrogatories this Respondent answereth and saith, That a series of such letters written, as in this case, from England to a woman in Scotland, and by a person who had been in Scotland, and had written the like letters while there, would be good evidence of marriage against him, more especially, if while in Scotland he had also given written promises and acknowledgments of marriage, and might reasonably be presumed not be quite ignorant of the custom of Scotland respecting marriages.

18, 19, 20. To the eighteenth, nineteenth and twentieth of the said additional Interrogatories this Respondent answereth and saith, That he does not understand that there is any such thing known in the law of Scotland, as an irrevocable engagement or obligation to marry, and that no damages are even given in *solatium* of a disappointment by breach of engagement to marry how solemn soever, but damages only in reparation of patrimonial loss actually sustained by the party on such an occasion; the principle of the Scotch practice being, that the will of parties ought to be quite free and unbiassed at the moment of contracting this indissoluble union; that where an engagement to marry is followed by knowledge of the woman's person, things pass into a state of actual marriage, and that he is not acquainted with that intermediate condition of obligation, which is alluded to in this query.

21. To the twenty-first of the said additional Interrogatories this Respondent answereth and saith, That certainly the rule of the law of Scotland respecting promise and copula, is recommended by the evident and substantial justice of such a decision, but that in the Respondent's opinion, the rule is founded also in a just construction of the conduct and purpose and state of mind of the parties, and on that ground it is, that the doctrine has been recognized in the law,

and is presented in the works of authors. That in the Deponent's opinion, where copula follows between parties who have exchanged promise of marriage, this act has relation to and is under the seal of that contract, and is truly the implement and execution thereof in its most essential particular, the possession of each others person, whereby matters pass, and are by the parties meant to pass out of the state of a promise *de futuro*, into that of an executed promise, or present marriage, whereof they have entered on the rights and duties. That in nature, this is what does and must pass in the minds of parties so situated, and on such an occasion; that the woman making delivery of her person in pursuance of the previous engagement, does *eo ipso* recognise the man *de præsenti* as her husband, of which character she admits him to the privileges, as he on the other hand claiming and taking these privileges in pursuance of his promise, substantially professes that character, and agrees *de præsenti* to bear it. That in the passage referred to in this query, this doctrine is distinctly delivered by Erskine, as relative to the case of copula following on a regular contract of marriage, and the Deponent sees no reason and knows no authority for distinguishing in this article between a regular contract and a written promise, if precise and explicit.

22. To the twenty-second of the said additional Interrogatories this Respondent answereth and saith, That he will not presume to say (no such question having been tried) that in no circumstances and by no mode of evidence can the presumption of a present consent be overcome, but he thinks it is clear that only the most pointed and convincing evidence shall prevail against the presumption.

23. To the twenty-third of the said additional Interrogatories this Respondent answereth and saith, That he does not think it necessary to answer a question which appears to be fanciful and strange, and not to have any relation to the natural and ordinary course of things.

24. To the twenty-fourth of the said additional Interrogatories this Respondent answereth and saith, That he considers Lord Stair as by far the ablest and most profound of

the writers on the law of Scotland, and his Institute as a work of higher authority than any of the other systems of that law, not excepting Sir Thomas Craig's work *de Feudis*. That the Respondent does not discover any looseness of thought, or inaccuracy of expression in the passages of Stair referred to, but rather precision in both respects; and that the doctrine delivered by Stair on the point in question, appears to the Respondent not to be in opposition to that of Craig, whom in one of the passages he expressly refers to, and that the difference between Craig and Stair is in this only, that Stair assigns the reason and principle of the rule, which is in his ordinary practice, and one of the recommendations of his work. That both Craig and Stair do mention judgments that had been given, sustaining marriage by promise and copula, and that the Respondent knows no authority more competent than Stair to explain the true grounds of those judgments, and that in these circumstances he must consider Lord Stair's *dictum* as good evidence of the tenor and meaning of the law.

25, 26. To the twenty-fifth and twenty-sixth of the said additional Interrogatories this Respondent answereth and saith, That a contract of marriage in Scotland is a solemn deed, and executed generally in presence of the relations of parties, and that it bears by common style a declaration in words as strong as those of any of the exhibits; that the parties *de præsenti* do take one another for man and wife, but that the parties are nevertheless not held to be married thereby, because the contract also bears by common style a clause obliging the parties regularly to solemnize the marriage, from which, joined with the whole other circumstances ordinarily attending such contracts, it is made evident that there was no purpose of dispensing with the ceremony, and that the contract was a preparation for it only; that these reasons are in no ways applicable to writings, such as the Exhibits No. 2 and 10, which are given in circumstances of an opposite description, and for the purpose of superseding the ceremony, where it is found impracticable or ineligible. That in his answers to the Interrogatories in

chief, the Respondent has already given his opinion as to the power of the Writings, No. 2, and 10, to make an actual and irrevocable marriage, more especially when followed by a series of acknowledgments in the Defendant's letters; and the Respondent has also signified his opinion of the view which ought to be taken of the matter of carnal intercourse between the parties, as a circumstance of evidence only, to mark their serious resolution to be immediately married, and not as the seal or completion of the contract.

27. To the twenty-seventh of the said additional Interrogatories this Respondent answereth and saith, That in his opinion, the Writings No. 2 and No. 10, were sufficient irrevocably to fix the parties as man and wife, unless it can be clearly shown by other evidence that they were not so meant and understood by the parties.

28. To the twenty-eighth of the said additional Interrogatories this Respondent answereth and saith, That by the mutual acknowledgment, No. 2, and the mutual acknowledgment, No. 10, more especially when attended with carnal intercourse, the Plaintiff was irrevocably married to the Defendant, and in a process of Declaration of marriage he might have compelled her to exhibit those writings, if extant, and to take her oath as to her possession of them or her knowledge where they were to be found: or in case of her having destroyed the writings, she might in like manner have been put to her oath as to that fact, and evidence would have been admitted in the process of declarator, as to her former possession of these writings and the tenor and import thereof.

29. To the twenty-ninth of the said additional Interrogatories this Respondent answereth and saith, That in the case of David McKie and Peggy Ferguson, 2d August, 1781, marriage was declared on evidence of a present and mutual acceptance as spouses, which followed on their having been in bed some hours, and after which they separated, and did not meet again before the commencement of the process; that in the case of William Cowan contra Janet Hart, 20th January, 1802, being a question concerning a widow's provisions,

marriage was held to be effectually constituted by the act of parties in going before a justice of the peace, and declaring themselves married persons; that in this instance, as in M'Adam's case, the parties had previously cohabited, and children had been begotten, but no change moved on the declaration, nor was any child afterwards begotten to make room for the plea of *res non sunt integræ*; that the judgment of the Court of Session, in the case of Taylor and Kello, 16th February, 1799, where no carnal intercourse had taken place, is also an acknowledgment of the principle that consent *de præsentî* does of itself make a marriage, and the Respondent has already said, that the reversal of this judgment is no wise to the impeachment of that principle, as the House of Lords proceeded upon circumstances of real evidence, in exposition of the true meaning and intent of the mutual written acceptances, as something different for what it imported on its face. That in the case also of Elizabeth Ritchie contra James Wallace, 15th June, 1792, the declaration of marriage, which was the ground of judgment, was given at the close and not at the outset of the connection of parties.

30. To the thirtieth of the said additional Interrogatories this Respondent answereth and saith, That a contract of marriage, however expressed, must be equivalent to a promise of marriage, and when followed with carnal intercourse it makes a marriage, for the same reason as a promise given in some less formal writing, or proved only by oath of party.

31. To the thirty-first of the said additional Interrogatories this Respondent answereth and saith, That this question is put too generally, and without the statement of a sufficient case. That to make way for such a plea, in protection of the regular and public marriage, it will be necessary to suppose these things; that the former woman has special and certain knowledge of the man's addresses to another, and this in such a way as must impress her with a belief of his serious resolution on the subject, which can hardly be without communication from himself; That she

be so situated that she may easily and conveniently make her claim, and is not withheld by any reasonable motive from doing so. That she be allowed full time and opportunity to bring forward her claim, and that she have access to advice for the regulation of her conduct. That even where all these circumstances concur, the effect of the woman's silence must in a great measure depend upon the strength and clearness of the documents of her own prior contract, such conduct being a material ingredient of presumptive evidence against her, where her marriage is to be inferred from equivocal or ambiguous writings, and sufficient probably in these circumstances, and as matter of presumptive evidence, to cast the balance against her; but with respect to a case of the opposite description, the Respondent can only say that the question, even when attended with all these favourable circumstances for the regular and public marriage, is one of great delicacy and nicety, more especially if the woman claiming have a child by the man, and if her acquiescence is not long continued after his marriage; and that considering this as at present an unsettled question, the Respondent cannot go the length of giving it as his opinion that a case may not occur in which the posterior public marriage ought to be found void; that more especially he hesitates to give any such opinion, as the law of Scotland holds out to every person who knows or suspects that he is liable to any such claim, the means of coming to a certainty of his condition, viz. by calling the suspected claimant in a process of declarator of putting to silence, of the nature of an English process of jactitation of marriage, and thus compelling her to advance her claim and have it tried, or else submit to have a decree given, finding that it is a groundless claim, and shutting her mouth for the future. That more particularly with relation to the present case, the Respondent is of opinion that this was the due and proper course to be observed by a person who had granted such acknowledgments of marriage as the Exhibits Nos. 2 and 10, or such a promise of marriage as the Exhibit No. 1, if followed with copula, or who had written such a series of letters, as the other exhibits in this case; and that

thus circumstanced, the Defendant could not warrantably rely on the silence of the Plaintiff as putting his public marriage out of the reach of challenge. That in the Respondent's opinion, the public marriage in all such cases ought to operate, not as a bar *in limine*, or ground of a plea of personal objection, but as matter of presumptive evidence along with the other circumstances of the case.

DAVID HUME.

The same Witness examined on the further additional Interrogatories given on behalf of the said John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said further additional Interrogatories this Respondent answereth and saith, That the case there mentioned was a very unfavourable one for Mrs. Cockrane, inasmuch as she had acquiesced in the man's marriage to another for a period of twenty years, during which she had lived in their neighbourhood and society, and even sometimes in family with them; and inasmuch as she brought forward her claim after the man's death only and for the sake only of a patrimonial interest as his widow, that for these reasons he does not think that the decision in that instance, would be a rule for the present case even if the judgment had not been altered on review; but that the judgment was reversed in the House of Lords, who sent back the case to the Court of Session, with an order to repel the plea in bar, or plea of personable objection, and allow a proof; which proof was taken accordingly, and on consideration of it judgment was finally given, (21st June, 1751) finding "That Mrs. Magdalen Cockrane had not proven her prior marriage libelled."

2. To the second of the said further additional Interrogatories this Respondent answereth and saith, That he has already sworn at large on that head, in his answers to the

several of the preceding Interrogatories; and on considering the decision referred to in this query, he does not see any reason to alter the opinion formerly given, as to the effect of copula following on a promise; that what is said in Kilkeran respecting Hyslop's case, appears to the Respondent not to be the opinion of the bench, or of the judge reporter, but the argument of counsel only; and besides that, much weight cannot be given to a passing expression falling from the bench, when relative to a former case and not necessary to the decision of the case in hand, in which there was no question of marriage at all, or impediment by intervening marriage.

3. To the third of the said further additional Interrogatories this Respondent answereth and saith, That he has perused the said decision with which he is well acquainted, and sees no cause to alter his answers to any of the preceding Interrogatories, and that he agrees with the judge reporter, in thinking that insinuations, or light and passing promises of marriage are not sufficient grounds of a declarator of marriage, though followed with copula, and that every such promise to be effectual, must be serious, deliberate, and explicit.

To the fourth of the said further additional Interrogatories this Respondent answereth and saith, That Lord Kames is known to have entertained many peculiar notions on matters of Scotch law, and that his work mentioned in this query is in a great measure a collection of these singular opinions, inasmuch that at one time he meant to publish it with this title: "*What is Law, and ought not to be Law, and what ought to be Law and is not Law.*" That his opinion on the article in question, has not shaken the authority of the decision in the case of Pennycook and Grinton, which was intended as a settlement of the question of law, and is so reported in the collection of decisions published by authority of the faculty of advocates, and was not influenced, as Lord Kames supposes, by the circumstance of non publication of banns.

In the close of all, the Respondent hopes he shall be pardoned for observing, that although he has answered the additional

and further additional Interrogatories out of deference for the counsel whose names appear at them, yet still he cannot but consider them as being of an unusual, and an exceptionable tenor and style, and such as is fitter for the detection of a witness who is suspected of perjury on a matter of fact, than of a lawyer called to give a professional opinion; and that if evidence concerning the law of Scotland is to be taken after this fashion, the counsel at the Scotch bar must be disposed to decline giving their assistance on any such occasion.

DAVID HUME.

7 August, 1809.

Repeated and acknowledged at Edinburgh, before me, the undersigned,
WM. COULTER, Lord Provost.

In the presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of
Mrs. DALRYMPLE.

7th June, 1809.

ROBERT HODSHON CAY, of the City of Edinburgh, Doctor of Laws, aged about fifty-one years, a Witness produced and sworn, deposes and says, that he has practised as an Advocate before the Supreme Court of Session in Scotland since 1780, and that he acted as one of the judges in the Commissary Court of Edinburgh, which is the Consistorial Court of Scotland from 1788 till 1801, since which last period,

he has held the situation of Judge of the High Court of Admiralty in Scotland. And further to the eleventh article of the said Libel he deposes and says, that he has attentively perused and considered the said eleventh article, and the several Exhibits annexed to the Libel, and that he is clearly and decidedly of opinion that if the hand-writing of these Exhibits, and a cohabitation of the parties in consequence thereof, were acknowledged or proven, they together with such cohabitation, (copula) would be sufficient by the law of Scotland to constitute marriage between the parties. That during the twelve years the Deponent held the situation of one of the Judges of the Commissary Court of Edinburgh, as above deposed to, no decision of that court was pronounced contrary to this opinion, nor is the Deponent acquainted with any decision of the Commissary Court, even as altered or corrected by the Court of Session or the House of Lords, (those of Taylor contra Kello, M'Innes contra More, Dobson contra M'Laughlane, and Anderson contra Fullerton, not excepted) which appear to him when thoroughly considered, to be adverse to the principles on which his opinion is founded.

The same Witness examined on the Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, That he is not acquainted with the laws and usages of Scotland at any period, (since the reformation was fully established at least) in which writings of the tenor of those annexed to this Libel, together with a consequent and subsequent copula, would not have been held to constitute marriage.

2. To the second of the said Interrogatories this Respondent answereth and saith, That the law of Scotland on this subject may be collected and ascertained from the reported

and recorded decisions of the courts of justice, and from the writings of authors of acknowledged and received authority; and the Deponent has formed his opinion from these sources, and from the received law and uniform practice of the Commissary Court, while he had the honour of sitting on that bench, as well as from a careful perusal of all or most of the prior records of that court, which are preserved in an accessible state, together with an unremitted attention to the proceedings and decisions of the Court of Session when reviewing consistorial decisions ever since he left the Commissary Court.

3. To the third of the said Interrogatories this Respondent answereth and saith, That he knows of no difference between the legal effects of a marriage constituted by a consent *de præsenti cum subsequente copulâ*, and a marriage celebrated in *facie ecclesiæ*, unless the fine or other punishment to which the former as a clandestine marriage may subject the parties were to be esteemed such a difference. The distinction between a marriage constituted by a consent *de præsenti cum copulâ*, and by a promise *cum copulâ*, does not appear to the Deponent to be received or adopted in our courts of justice, which to the best of the Deponent's knowledge and belief, have at no time acknowledged the passages in the Elucidations of a celebrated author on this subject, as being of any authority.

4. To the fourth of the said Interrogatories, this Respondent answereth and saith, That in his apprehension, a marriage constituted by mutual consent *de præsenti* with a subsequent copula, would be held binding upon the woman as well as upon the man. Cases of this kind where the woman is Defendant, are extremely rare. That of Taylor contra Kello, does not appear to be adverse to the Deponent's opinion, for in that case no copula was proven or admitted, and circumstances occurred and were noticed in the judgment of the House of Lords, 16 Feb. 1787, and were held to negative any marriage whatever, regular or irregular, between the parties. Marriage to be binding on both parties must be constituted by mutual consent, and it is only on the consent of

the woman taken in conjunction with that of the man, that any action of adherence against her can be founded.

5. To the fifth of the said Interrogatories this Respondent answereth and saith, That he knows of no alteration in the situation of the man that could take away a woman's right to have a prior marriage declared; a subsequent marriage in *facie ecclesiæ* between the woman and another man, might affect her right of action to have the first marriage declared, because such action could not be maintained without professing herself guilty of bigamy, which perhaps a court of justice would not permit her to do, and *cui bono* maintain an action, which would be altogether nugatory; the second marriage affording to the first husband, an unexceptionable ground for divorce.

6. To the sixth of the said Interrogatories this Respondent answereth and saith, That he conceives that where a marriage is constituted in Scotland by a consent *de præsenti cum subsequente copulâ*, that any subsequent marriage in England or elsewhere, would be null and void, even although the Scots marriage had not been previously made the foundation of any proceedings in the courts of Scotland; and that he is not aware of any distinction in this respect between a marriage constituted by consent *de præsenti cum copulâ*, and a marriage constituted by promise *cum copulâ*; nor does he think the circumstances alluded to in the conclusion of the Interrogatory of a man's ceasing to be a domiciled Scotsman, could liberate him from legal obligations validly contracted prior to the alteration of his residence.

7. To the seventh of the said Interrogatories this Respondent answereth and saith, That he would hold a mere declaration in writing to be only equivalent to the clause in most ante-nuptial contracts of marriage, whereby the parties declare in words *de præsenti*, that they accept of one another as husband and wife, and consequently as *per se*, only constituting an obligation to marry. But that if such written declaration were followed by habit and repute, (publicly residing together, owning and acknowledging each other as husband and wife, and being so held and reputed) by subse-

quent copula or by actual regular celebration, that it would in conjunction with any one of those circumstances occurring in Scotland, constitute a lawful and irrevocable marriage according to the law of Scotland.

8. To the eighth of the said Interrogatories this Respondent answereth and saith, That it is already answered in so far as relates to a subsequent copula, where the copula has been antecedent to the declaration, and where no such copula follows its date, some doubt may be entertained, as questions might be let in as to the views or motives of granting and accepting of such declaration, as in *More contra M'Innes*, decided ultimately in the House of Lords, by reversing the decrees of the courts below on 25 June 1782.

9. To the ninth of the said Interrogatories this Respondent answereth and saith, That the circumstances here set forth, if attended by copula, would undoubtedly constitute marriage; if not attended by copula, would in the Respondent's apprehension only constitute an obligation to marry, though he is well aware that some difference of opinion prevails among lawyers on this last mentioned point on the application of the rule *consensus non concubitus facit matrimonium*.

10. To the tenth of the said Interrogatories this Respondent answereth and saith, That mistakes or doubts or apprehensions with respect to the legal effects of what has passed between the parties cannot affect the rights or obligations of either, which may be declared or enforced at any period, notwithstanding any intervening doubts or apprehensions on the part of either or of both. R. HODSHON CAY.

The same Witness examined on the additional and further additional Interrogatories, given on behalf of John William Henry Dalrymple, Esq. the other Party in this Cause.

1. To the first of the said additional Interrogatories this Respondent answereth and saith, That he has not been in the habit of considering the opinions of Sir Thomas Craig, as of

supereminent authority in consistorial questions. For some time previous to the assembling of the Council of Trent, the inordinate ambition of the Romish church had induced the Consistorial Courts, then universally held by churchmen, to confound the civil effects of a mere consensual contract, with the mysterious ecclesiastical effects of the supposed sacrament: these usurpations were confirmed by that council, and the consistorial law, as administered by the church courts, from that time till the Reformation, conceived themselves bound to deny all effect whatever to such marriages as had not been duly celebrated as a sacrament. That Sir Thos. Craig wrote his treatise *de feudis* very recently after the Reformation, at a time therefore when the rules and decisions on which his opinion must have been founded, could only relate to the *Jus tunc prope hodiernum* of the Romish church courts. That the Respondent cannot possibly say how far his (Sir Thomas Craig's) opinions were or were not agreeable to what might be conceived to be the Consistorial law of Scotland at that time, though for the reason already given, he thinks it doubtful whether Scotland could at that time be said, with any propriety, to possess any settled consistorial law. That the courts and the lawyers of the reformed church have in Scotland concurred in rejecting the more modern ecclesiastical law of Rome, though they still reverence and respect the decretals, which were issued before the ecclesiastical doctrines of that church were infected with the corruptions afterwards sanctioned by the Council of Trent. These more ancient decretals are therefore quoted and acknowledged as authorities in the Consistorial Courts of this part of the united kingdoms. That as to the passages referred to in this query, in so far as they relate to legitimacy and legitimation, the Respondent means to give no opinion, as they have no relation to the article of the Libel on which he was examined, nor to the answers which he gave to the examination in chief; and with respect to the first sentence in §. 21, it appears to the Respondent not very consistent with the more ancient canon law itself, which continues to be regarded as making a part of the law of Scotland, in which we find the following direct and

unequivocal authority Lib. 4, Tit. 1. Decret. Gregorii IX, *De Sponsalibus et Matrimonio* “*Is, qui fidem dedit mulieri super matrimonio contrahendo, carnali copulâ subsecutâ, si in facie ecclesiæ ducat aliam et cognoscat, ad primam redire tenetur; quia licet præsumptum primum matrimonium videatur, contra præsumptionem tamen hujus modi non est probatio admittenda.*” “*Ex quo sequitur, quod nec verum, nec aliquod censetur matrimonium, quod de facto est post-modum subsecutum.*” That it may further be observed, that even in the time of Sir Thos. Craig, it began to be held, that actual celebration was not held to be absolutely and essentially necessary, as appears from the case of Yonger cited by him in §. 19; that the changes, if any, which have taken place in the law of Scotland since Sir Thomas Craig’s time, have the Respondent conceives, arisen partly from a firmer rejection of the rules of the Romish church, and the decisions of the Romish church courts during the times immediately anterior to the Reformation; partly from a stricter attention to the more ancient regulations of the Romish church while it was yet untainted by the anomalies which an inordinate ambition afterwards introduced, and partly from the natural consequences of the Reformation itself, and the more enlarged notions of jurisprudence to which that Reformation gave birth. That these perhaps, with other causes to the Respondent unknown, gave rise to a series of decisions, which have fixed the law on the footing on which it now stands.

2. To the second of the said additional Interrogatories this Respondent answereth and saith, That he has always considered the passages in Stair’s Institutions referred to, as much more consonant to the genius of the Protestant Consistorial law of Scotland, than those referred to in the preceding Interrogatory; that on some particular points he is not very full nor very explicit, but so far as he goes, the Respondent thinks his opinion consistent with the law of Scotland as it stands now. By that time it had been decided that acknowledgments of marriage *cum copulâ* constituted actual marriage, not a mere obligation to marry, as is at least strongly inferred from the passage quoted from Nicholson *de Nuptiis* in the

section first referred to in this Interrogatory. That the passages referred to in Book III. Tit. 3, in so far as they relate to legitimacy, the Respondent does not mean to speak to, but on that passage in which he says, that “after contract,” “(by which the Respondent understands an express consent *de præsenti*) “or promise of marriage, or *sponsalia*, if copulation follow, there is thence presumed a matrimonial consent *de præsenti*, which therefore cannot be passed from by either or both parties, as having the essential requisites of “marriage.” The Respondent may observe, that it is confirmed and corroborated by another passage in the work of the same learned and noble author, Book IV. Tit. 45, § 19, where he says, “Marriage is proved by the *sponsalia* preceding, as by the contract of marriage whereby the parties oblige themselves to solemnize marriage and by copulation following, or even by antecedent promise of marriage, whatever be the way that it is obtained or granted, if copulation follow without violence; although the promise were conditional, and that the condition is no otherways purified but by copulation,” (by “purified” in the Scots law idiom is meant fulfilled.) This doctrine the Respondent considers to be conformable to the law of Scotland, as the same has been since determined in a variety of cases.

3. To the third of the said additional Interrogatories this Respondent answereth and saith, That he conceives the decision in the case of Pennycook and Grinton, against Grinton and Graite, to have been pronounced in conformity with the rule of the ancient canonical law already quoted: with the passages to be found in Lord Stair’s Institutes; with the decision in the House of Lords in the case of Jean Campbell and her daughter, against Colin Campbell and Magdalen Cochrane, pronounced 6th of February, 1748; with the subsequent decision, 23d of February, 1785, Helen Inglis against Alexander Robertson; and with the general tenor and principles of the consistorial law of Scotland. And the Respondent having mentioned the case of Campbell against Cochrane, will take the liberty of adding a few of the circumstances of that case, as collected from the records of the

Commissary Court. Captain John Campbell, of Carrick, on the 9th of December, 1725, was, without previous proclamation of banns, married to Jean Campbell, by a clergyman, and a certificate of that marriage was granted, signed by the clergyman and by two witnesses; and as this marriage was private, and in so far irregular, John Campbell the husband, and afterwards Jean Campbell the wife, appeared before the proper Ecclesiastical Court, to answer for the irregularity, when they were severally rebuked for the said irregularity, and did severally enact themselves to adhere in all times coming, and to be faithful and kind one to another; by all which the *labes* of the irregularity was done away. After this they publicly resided together as husband and wife for twenty years, and were held and reputed as such, and the other pursuer Jean Campbell the younger, was the issue of that marriage, and was held and reputed as the lawful issue thereof. After the death of John Campbell the husband, Magdalen Cochrane obtained letters of administration in England, as his widow, with a view of obtaining the pension due as to an officer's widow. Jean Campbell and her daughter raised an action before the commissaries of Edinburgh to have it found and declared that she was the lawful widow, and the other the lawful child of John Campbell. In that action no appearance was made for Magdalen Cochrane, a proof was allowed, and it came out in evidence, not only that no claim was ever openly urged by Cochrane, during the lifetime of John Campbell, but that, on more than one occasion, she, Magdalen Cochrane, had been in company with Jean Campbell and others, and heard and seen her, Jean Campbell, treated and addressed as the wife of John Campbell, while she suffered herself to be treated and addressed as the widow of one Kennedy, a former husband. After this proof was had, Magdalen Cochrane brought a cross action of declarator, in which she founded upon an alleged holograph acknowledgment by John Campbell, dated 3d July, 1724, bearing that he was solemnly and lawfully married to Magdalen Cochrane, but without mentioning the date of such marriage, and this pretended marriage having been as alleged prior to that

of Jean Campbell, concluding *inter alia* to have it found and declared that Captain John Campbell and Mrs. Jean Campbell were never lawfully married together, and that it is false, groundless, and injurious to her to allege any such thing, &c. Both parties were assisted by most able and industrious counsel. It was pleaded for Mrs. Campbell, that a formal marriage followed by open and public cohabitation, habit, and repute, was not, after subsisting for twenty years, to be set aside, and the children bastardized, by an alleged secret and latent marriage, though said to have been prior in date; and that therefore no proof should be allowed of such alleged prior clandestine marriage, especially after the death of the alleged husband, who alone could be able effectually to traverse such proof: and further, that Magdalen Cochrane, by allowing the marriage to subsist openly for twenty years, nay, by suffering Jean Campbell without contradiction, to be treated as the lawful wife in her own presence, was now barred *personali exceptione* from leading any proof to the contrary; these pleas were undoubtedly invincible on the supposition that what was alleged to have passed between John Campbell and Magdalen Cochrane, (there being no issue from their alleged connection,) only inferred an obligation to marry, without actually constituting marriage between the parties. One of the pleas was urged in the following words:—Commissary Record, page 107, “A promise of marriage *cum copulâ*, has this effect to oblige the refractory party by a process at law to fulfil, but, if before sentence is pronounced, the refractory party be publicly married to another, the marriage is good and cannot be avoided by the allegances of the antecedent promise and copula with another.” But this, and all other pleas in bar urged to exclude Magdalen Cochrane from leading a proof to the effect if she succeeded in that proof, of depriving Jean Campbell of the *status* she had openly acquired and publicly enjoyed during twenty years, was repelled by the commissaries, who, by their interlocutor, 23d June, 1747, “Before answer allowed the said Mrs. Magdalen Cochrane a proof of her libel, and of all facts and circumstances tending to infer the marriage

libelled." Of this interlocutor Jean Campbell complained to the Court of Session. Her bill of advocation was refused by the Lord Arniston, 7th July, 1747; she then presented a petition against that interlocutor of Lord Arniston, praying the court "In consideration of the peculiar circumstances of this case, to find that Mrs. Magdalen Cochrane is barred *personali exceptione* from insisting in this declarator of her pretended marriage." The Court of Session were of a different opinion from the commissaries, for they, by their interlocutor, 29th July, 1747, "Remitted the cause to the commissaries with this instruction, to find that Mrs. Kennedy was barred *personali exceptione* from being admitted to proof that she was married to Mr. Campbell of Carrick, before he was married to Mrs. Jean Campbell," and this remit was applied by the commissaries. Mrs. Kennedy entered her appeal to the House of Lords, complaining of this interlocutor, and the Appellant's counsel having been heard on the 6th of February, 1748, their lordships, (the counsel for the Respondent being likewise heard and consenting thereto,) reversed the interlocutor of the Court of Session, and returned to that of the commissaries, allowing a proof, thereby virtually finding that no degree of concealment of a marriage by both parties, and no silence, or even acquiescence of the woman in a posterior public and open marriage of the man with another woman, could bar her at any after period, even after the death of the alleged husband, from asserting her own individual rights as widow, (there being no issue of her own connection) even to the effect of annulling a posterior public marriage, and depriving the widow of such public marriage of her *status*, and place in society as such. It is very true that Mrs. Cochrane (or Kennedy) failed to prove any marriage between her and Captain Campbell, and therefore Mrs. Jean Campbell was assoilzied from Magdalen Cochrane's declarator, and finally prevailed in her own. But this went on the point of fact alone, and no way touches the point of law. Upon the whole, the Respondent is of opinion that the case of Pennycook and Grinton against Grinton and Graite, though certainly a very strong case in-

deed, was well decided, and according to the principles of Scots law, by which a promise and copula, and *multo magis* a consent *de præsenti*, with subsequent consummation, constitutes marriage itself, not a mere obligation to marry; and consequently it follows, that a woman having by these or any other means acquired the right and *status* of a wife, cannot be deprived of them by any subsequent marriage between her husband and any other woman.

4. To the fourth of the said additional Interrogatories this Respondent answereth and saith, That cases of this kind are fortunately extremely rare, and that he does not recollect any subsequent case precisely similar in all its circumstances to that alluded to; that in the case of Helen Inglis against Alexander Robertson, the commissaries, 23d February 1785, found, that acknowledgments, as of a past marriage in letters, were sufficient to found a declarator of marriage against the Defendant, although he had been subsequently married to another woman by whom he had issue, and this although there was no issue of the alleged connection between the pursuer and defender; and found the pursuer and defender married persons accordingly. And this judgment was affirmed by the Court of Session, 3d of March 1786; the circumstance of there having been issue of the second marriage is not mentioned in the report, but was asserted on the one part and not denied on the other in the printed arguments, on which the case was determined in the Court of Session. That this case was not altogether so strong as that of Pennycook against Grinton, but the Respondent considers the principle which regulated that decision, viz. That even promise *cum copulâ*, so effectually constitutes marriage in Scotland, that its effects cannot be obviated by any conduct, consent, disclamation or discharge by the woman, nor by any subsequent marriage by the man to be so firmly rooted in the law of Scotland, that nothing short of an act of the legislature can possibly overset it.

5, 6, 7, 8, 9. To the fifth, sixth, seventh, eighth, and ninth of the said additional Interrogatories this Respondent answereth and saith, That the law of Scotland is fortunately

like that of all other countries, capable of gradual expansion and improvement, and that hearings in presence, that is, solemn arguments are sometimes ordered with a view of applying the principles of the law to particular and unusual cases, and even sometimes to review, and if necessary to correct the application of immutable principles to cases and situations similar to those which had been formerly decided. But the Respondent does not conceive that the Court of Session would order a hearing in presence, or betray any other symptom of hesitation on a case of a consent to marry *per verba de præsenti*, proven by written evidence, the authenticity of which should be acknowledged or proven, attended by a subsequent and consequent consummation also acknowledged or proven. That it is not for him to say what the Court of Session would do in a case precisely similar to that of Pennycook and Grinton, but were a case similar to that in all its circumstances again to occur, it would not at all surprise him were they to order it to be solemnly argued at their bar, though he is of opinion that the ultimate decision would be similar to that formerly pronounced.

10. To the tenth of the said additional Interrogatories this Respondent answereth and saith, That he is of opinion that the prior latency of the writings would not be held to derogate from their effect, when afterwards made the foundation of legal proceedings.

11. To the eleventh of the said additional Interrogatories this Respondent answereth and saith, That he does not consider this Interrogatory as at all applicable to the case stated in the Libel, which appears to him to rest not on the ground of promise *de futuro cum copulâ subsequente*, but on that of marriage constituted by consent *de præsenti*, with subsequent and consequent consummation; though upon the grounds repeatedly stated, he is of opinion that a subsequent marriage however formal, would not obstruct a declarator of marriage founded on a promise with subsequent and consequent copula, also prior to such formal marriage with another woman.

12. To the twelfth of the said additional Interrogatories this Respondent answereth and saith, That this Interrogatory does not appear to bear any direct relation to any passage in

the article of the Libel upon which the Respondent was examined in chief, but he does not hesitate to say, that the effect of any subsequent marriage between the Defendant and any other woman, would be weakened rather than strengthened, if that circumstance took place not in Scotland where the Plaintiff lived, and where she might have interfered to prevent it, but in a foreign country and at a distance from her residence.

13. To the thirteenth of the said additional Interrogatories this Respondent answereth and saith, That the laws and usages of Scotland, would in his opinion be held as applicable to any marriage contracted in Scotland by any Foreigner, whether a military officer or not, who had, previous to entering into such contract resided above 40 days in Scotland. The law and practice of Scotland as to the *forum domicilii*, seem not so strictly to require the full residence of forty days in the case of a military man, as in that of a foreigner residing in Scotland in a mere civil capacity, Lees against Parlan, 12th November 1709, Fountainhall, and Dictionary of Decisions, vol. I. page 326.

14, 15, 16, and 17. To the fourteenth, fifteenth, sixteenth, and seventeenth of the said additional Interrogatories this Respondent answereth and saith, That as they relate to hypothetical cases, which in so far as he knows have not been agitated, and which perhaps never may occur, and as the decisions in such cases were they ever to happen, might be materially affected by the special circumstances of each, he declines to give a decided opinion on such general statements as those contained in the aforesaid Interrogatories.

18. To the eighteenth of the said additional Interrogatories this Respondent answereth and saith, That by the law of Scotland he understands that even a promise *de futuro cum subsequente copulâ*, (*multo magis a consent de presenti cum consummatione*) constitutes actual marriage, in terms of the thirtieth chapter of the first title of the fourth book of the Decretals of Gregory the Ninth, which as it was compiled prior to the corruptions sanctioned by the Council of Trent, is received by our courts as an authority in matters of this kind, and in terms of repeated decision of the Scot's courts, so as not

to be derogated from by any act of either party, or by the subsequent regular or irregular marriage of either.

19, 20. To the nineteenth and twentieth of the said additional Interrogatories this Respondent answereth and saith, That according to the law of Scotland, he knows of no obligation to marry followed by a copula in consequence thereof, which can according to the law of Scotland, be retracted by either party or by both.

21, 22. To the twenty-first and twenty-second of the said additional Interrogatories this Respondent answereth and saith, That the constitution of marriage by promise and copula, (which does not appear to him to be the case before him) rests on the ground of the passage already quoted from the Decretals, as well as repeated decisions of the courts in Scotland, the result of which, is, that the presumption of present matrimonial consent at the moment of a copula permitted and enjoyed in consequence of a prior consent, admits not of being redargued by any proof, acknowledgment, discharge, dissent, or subsequent event whatever; but does *ipso facto* constitute marriage between the parties, incapable of dissolution by any means short of those which would have dissolved a marriage regularly and publicly solemnized in *facie ecclesie*; that such events do not constitute a mere obligation to marry in favour of the woman, the validity of which is to depend on the future actual celebration, appears to have been very early determined as in the case of Younger, mentioned by Sir Thomas Craig in the nineteenth section, referred to in the Respondent's answer to the first of said additional Interrogatories; likewise by the following subsequent decisions, sustaining declarators on such grounds after actual celebration had become impossible, in consequence of the death of the husband in the case of Barclay against Napier, cited by Lord Stair, B I. Tit. 4. § 6., vide also Hope voce Husband and wife, and Kerse M. S. 64. 23d February, 1714, Anderson against Wisheart, vide Forbes, M. S. June 1730, Murray against Smith, vide Dictionary, vol. II. page 530, where it will be found that action was sustained after the death of the husband, though the parti-

cular mode of proof offered was rejected ; 28th July, 1747, Campbell against Cochrane, alias Kennedy, where action was sustained by the commissaries, and their judgment affirmed by the House of Lords, Falconer and Records and Appeal cases, 18th November, 1766 ; Agnes Johnston against Smiths, 13th November, 1795 ; Anderson against Fullerton, 28th November 1801 ; M'Gregor and Campbell, against Campbell, in which last mentioned cases action was sustained, but the proof of marriage afterwards failed 20th January, 1802 ; Crawford's Trustees against Hart, where the widow was successful 4th March, 1807 ; Elizabeth Walker against M'Adam's Trustees, where also the widow was successful. That correct legal ideas upon this subject may be formed from the usual style of decrees of adherence on the ground of promise and copula, which does not ordain the defender to celebrate marriage, but finds facts, &c. proven relevant to infer marriage as having already taken place, and finds and declares the pursuer and defender married persons, and the Defender lawful wife (or husband) to the pursuer, and ordains the defender to adhere to the pursuer in all time to come. That the right of action is not cut off or barred by a subsequent marriage of the defender with another, appears from the decisions in the cases of Pennycook and Grinton against Grinton and Graite, where there was issue of both connections ; and in those of Campbell against Cochrane or Kennedy already cited, and Inglis against Robertson, 23d February, 1785, in both of which action was sustained though there was no issue of the first connection, and though the object of both was to set aside a marriage publicly avowed, of which there was issue reputed lawful, and which such action in the last mentioned case proved ultimately successful : that such irregular proceedings do not confer a mere right of action on the injured woman, which she might renounce, abandon, or discharge, appears from the following decisions : the case cited by Stair, Book I. Tit. 4. § 6, from Nicholson de Nuptiis : the case of Elizabeth Castlelaw against Agnew, of Shenchan, being a declarator of marriage on the ground of promise *cum copulâ*, in which the defender

produced “a discharge granted by the pursuer to the defender of date, 25th November 1715, whereby the said pursuer granted her to have received from the said defender, full and complete payment of all fees due to her for five years service, preceding Martinmas, 1715; wherefore she discharged the said defender of all fees due to her for the said service, and of all pretensions of marriage that she could claim of the said defender;” the commissaries the 15th August, 1717, “found the promise of marriage, with the posterior copula or concubitus libelled relevant to infer the conclusion of the libel, and probable by the defender’s oath of verity, and found the discharge not sufficient to elide the same;” vide Commissary Records, page 380; and although the case was afterwards most keenly contested, the justice of this interlocutor was not afterwards disputed in the Court of Session. So also in the case of Jean Campbell against Cochrane, it came out in evidence, that Mrs Cochrane or Kennedy, had not only acquiesced for twenty years in the deceased Captain Campbell’s marriage with Jean Campbell, but had in public companies during their co-habitation, herself addressed her in the character of Captain Campbell’s wife, acquiescing in the designation of widow Kennedy, repeatedly applied to herself by the individuals composing the same company, yet this was found to be no bar to her action, and the judgment of the commissaries was affirmed by the House of Lords. Lastly, in the case of Pennycook and Grinton contra Grinton and Graite, Agnes Pennycook at first brought a taction for inlying charges, and the damages due to her for debauching and leaving her, yet this was not found sufficient to bar her from prosecuting and succeeding in a subsequent declarator, in which she was successful in establishing her own marriage and setting aside the subsequently publicly avowed marriage with Graite, of which too there had been issue. That from these authorities it follows, that the presumption of a present matrimonial consent *tempore coitûs*, when a previous promise had been given and accepted between the parties, cannot be traversed by any proof however strong and direct; that when the woman submitted

to the man's embraces, she did so, not *intuitu matrimonii*, or on the faith and belief that she thereby became his wife. That hence the Respondent is of opinion, that if the case stated in the libel now before him, rested only on the ground of a promise cum copula, instead of a mutual present consent with consummation, that it would constitute actual and indissoluble marriage between the parties. That as to the passage in Erskine alluded to in the interrogatory, the Respondent is of opinion that it is so far defective, that it does not state the presumption spoken of to be a *præsumptio juris et de jure*, not to be controverted by any evidence whatever.

23. To the twenty-third of the said additional Interrogatories this Respondent answereth and saith, That the case here put has so far as he knows, never been argued or determined in the courts in Scotland, and does not appear to the Respondent to have reference to the case originally put and spoken to by him.

24. To the twenty-fourth of the said additional Interrogatories this Respondent answereth and saith, That as his opinion does not, as has been seen, rest on the authority of Lord Stair alone, he deems it unnecessary to make any answer to this question, further than such as have been already given.

25, 26. To the twenty-fifth and twenty-sixth of the said additional Interrogatories this Respondent answereth and saith, That they have been already answered in substance, he having stated an opinion, in which however he is aware that many lawyers may differ, from which it may be inferred that neither a regular contract of marriage in the usual style, nor the writings in process, would in his opinion be sufficient to constitute an irrevocable marriage, unless either actual celebration, habit, and repute or carnal copulation had followed.

27. To the twenty-seventh of the said additional Interrogatories this Respondent answereth and saith, That those exhibits are of such a nature, as if attended with either of the three circumstances mentioned in his answer to the two imme-

diately preceding Interrogatories, would bar either party from retracting.

28. To the twenty-eighth of said additional Interrogatories this Respondent answereth and saith, That the Plaintiff by the exhibit No. 2, provided the hand writing thereof were acknowledged and proven, and a subsequent and consequent copula were also acknowledged and proven, would by the law of Scotland, have been found to have contracted the indissoluble bonds of matrimony with the defendant. That had the plaintiff destroyed these writings, the defendant might have founded his action against the plaintiff on the counterpart of the correspondence in his own hands; and if even these had failed, might have instructed the consent by the plaintiff's oath and the copula *prout de jure*, or by the plaintiff's oath.

29, To the twenty-ninth of the said additional interrogatories this Respondent answereth and saith, That he cannot at this moment recollect any case, such as that referred to in this Interrogatory, as the case of Anderson against Fullerton, though action was there sustained in particular circumstances, had it been successful, would not in the Respondent's apprehension have come up to the spirit of the Interrogatory.

30. To the thirtieth of the said additional Interrogatories this Respondent answereth and saith, That in his apprehension every expression of deliberate and present mutual matrimonial consent, followed by copula, constitutes matrimony upon stronger and more incontrovertible grounds, well known to every lawyer, than any marriage constituted by promises *de futuro*, however solemn and though also followed by copula.

31. To the thirty-first of the said additional Interrogatories this Respondent answereth and saith, That such second marriage would be made void, because the prior marriage being complete and valid by the law of Scotland, no second marriage could be legal while the first remained undissolved.

That before taking leave of these additional Interrogatories this Respondent must take the liberty to observe, that in answering them he is conscious he may have committed two errors: that he may have derogated from the dignity of his

profession, in submitting to the toil and disgust of answering Interrogatories, which considered as cross questions, are irregular in their structure and degrading by the insinuations they imply; and he may have betrayed the best interests of the court from which they issue by contributing to shut out the truth in time to come. Scots law, to an English court of justice is matter of fact, and as such to be established by evidence; but the sources of the most legitimate information may be stopped, if professional men, by consenting (for they cannot be compelled) to give information on a point of their own law, are to be teased and insulted by such cross Interrogatories as ought only to be addressed to witnesses suspected of a desire to disguise or conceal the truth. That out of respect for the persons by whose signature these additional Interrogatories have been sanctioned, and ignorant of the customs and usages of the courts in which they practise, he has given such answers as occurred to him; but as the same inducements do not occur in favor of the further additional interrogatories he declines making any answer whatever to them.

R. HODSHON CAY.

7th August, 1809.

Repeated and acknowledged at Edinburgh before me the undersigned
WM. COULTER, Lord Provost.

In the presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

7th July, 1809.

ANDREW RAMSAY, Esq. of Whitehill, Advocate, aged sixty-seven years, a witness produced and sworn, deposes and says, That he has practised as an Advocate before

the supreme Court of Session in Scotland, since 1763, and that he acted as one of the commissaries in the Commissary Court of Edinburgh, which is the Consistorial Court of Scotland, from 1774, till 1807; and further to the eleventh article of the said libel he deposes and says, that he has attentively perused and considered the several exhibits annexed to the libel, and that marriage, by the law of Scotland may be constituted in several modes without regular celebration by a clergyman. It may be formed by acknowledgment of the parties containing words *de præsenti*, relevant by that law to infer marriage; by promise attended with copula betwixt the parties; and by acknowledgments in writing, clearly expressing the fact that a marriage had been formally contracted. Deposes, that he is clearly of opinion that in the present case, all of these grounds for constituting marriage, by the law of Scotland, concur. There is an acknowledgment by the parties, containing words *de præsenti*, relevant by the law of Scotland to constitute a marriage. There is an acknowledgment in the letters of the defendant, by his signature as the plaintiff's husband, and addressing her as his wife, of his having formerly contracted a marriage with Miss Johanna Gordon the plaintiff; deposes that with regard to the third ground, viz. promise and copula, the promise is here proved by the writing of the defendant in No. 1, of the Exhibits, he is also inclined to think from the letters of the defendant, that a copula has taken place betwixt the parties, and such is the impression which a careful perusal of the letters of Mr. Dalrymple has made upon his own mind. But the deponent does not see in these letters, any sufficient evidence of a copula, upon which alone the sentence of a judge declaring a marriage can rest. But he conceives that from the style of the letters, the copula, as by the laws of Scotland it is clearly probative by witnesses, may be proved in that manner; and he should think it rather prudent for the plaintiff to strengthen her cause by bringing such proof. At the same time he is clearly of opinion, that without such proof, the eleventh article of the libel is well founded; and he does not see in what manner it can be

avoided or defeated by any defence on the part of the Defendant.

ANDREW RAMSAY.

The same Witness examined on the Interrogatories given on behalf of John William Henry Dalrymple, Esq. the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, That he conceives that the law of Scotland, in regard to the validity of irregular marriages, has been at all times the same, though not so definite or so well understood as it has been of late by some decisions in the Consistorial and Supreme Court.

2. To the second of the said Interrogatories this Respondent answereth and saith, That he has formed his opinion of what is the precise law of Scotland at the present day regarding such marriages, from the Roman law which is the common law of Scotland; from the opinions of systematic writers, Lord Stair, Lord Bankton, and Mr. Erskine; and from the decisions of the proper Consistorial Court, which have either received the universal approbation of the country, or have been affirmed in the Supreme Court, and in the House of Lords.

3. To the third of the said Interrogatories this Respondent answereth and saith, That he considers a promise of marriage followed by a copula, or consummation, as equivalent in its legal effects to a marriage regularly celebrated, and not merely binding the party making it, to marry at some subsequent period.

4. To the fourth of the said Interrogatories this Respondent answereth and saith, That an irrevocable obligation on the part of the man to marry a particular woman, when accepted of by the woman is binding in all cases on the said woman, so as to prevent her from contracting a marriage with another man posterior to such obligation.

5. To the fifth of the said Interrogatories this Respondent answereth and saith, That a woman who has received an irrevocable obligation given by a man to marry her, is entitled to have her marriage declared by a decree of the proper court. The remaining part of the Interrogatory is too vague and indefinite to admit of a precise answer, but as relative to the situation of the parties, it has not suffered such alteration as to take away the woman's right to have the said marriage declared valid.

6. In answer to the sixth of the said Interrogatories this Respondent saith, That he conceives that the promise of a man to marry a particular woman, followed by a copula or consummation, taking place only in Scotland, will prevent the man from marrying another woman in England; such promise and such consummation will prevent the said man, although the said promise had not been previously insisted upon and declared binding at the woman's instance in the proper court in Scotland, and although the man had at the time of such promise and such copula, been in England and not possessed of any property or effects in Scotland.

7. To the seventh of the said Interrogatories this Respondent answereth and saith, That where a man gives a declaration in writing to a woman, whereby he declares her to be his lawful wife, such a declaration, by the law of Scotland, constitutes a lawful marriage.

8th. To the eighth of the said Interrogatories this Respondent answereth and saith, That the law of Scotland has distinguished betwixt a copula or consummation, antecedent or subsequent to the declaration mentioned in a former Interrogatory. The copula and declaration must be inseparably connected, or in other words must be cause and effect; a copula after such declaration will render the marriage complete, but a copula before it will not have the same legal effect, because when these two take place the law of Scotland presumes that the copula has taken place in consequence of such declaration. The declaration and copula when thus made out, constitute a marriage, and not merely an obligation to marry.

9. To the ninth of the said Interrogatories this Respondent

answereth and saith, That where a man gives a writing to a woman, acknowledging that he is her husband, and the two parties correspond with each other calling each other husband and wife, these facts by the law of Scotland, will constitute a marriage, not merely an obligation to marry, unless it shall appear from real and undoubted evidence that no consummation had taken place between the parties, that they never had any serious intention of marriage, or that they have both resiled from it for reasons in which they both concurred.

10. To the tenth of the said Interrogatories this Respondent answereth and saith, That he conceives that in the case stated in the former Interrogatory, the legal effect of the declaration and correspondence will not be avoided, although either the man or the woman express their doubts as to their being completely married, and signify his or their resolutions to marry publicly, or although one or both should express fears of being deserted by the other; because the mistakes or misconceptions of either of the parties, or their visionary terrors, will not alter the status which has been before fixed unalterably by their own acts and deeds, and constituting a valid marriage, and not merely an obligation to marry.

ANDREW RAMSAY.

The same Witness examined on the additional and further additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

TO all and each of the said additional, and further additional Interrogatories, this Respondent answereth and saith, That in so far as they are pertinent and bear upon the case, they appear to him to be answered by the responses to the former Interrogatories, which in his opinion were framed with judgment, and a deliberate consideration of the facts as appearing from the Exhibits referred to by the Plaintiff, and

exhausted the question before the Prerogative Court; and that these additional and further additional Interrogatories, seem to be framed for the sole purpose of puzzling, perplexing, and rendering the cause inextricable by holding it forth as resting on subtil questions of law, and a variety of decisions in former cases of marriage, which appear to him totally inapplicable to the case in hand. That having already given his evidence in chief, and answered the Interrogatories put to him by the Defendant to the best of his ability, he does not consider it as any part of his duty to answer these additional and further additional Interrogatories, because he conceives that he has fully discharged his duty as a witness and a counsel, by opinion and pointed responses to the former Interrogatories, which in his opinion contain whatever is material to the decision of the cause.

ANDREW RAMSAY.

7th August, 1809.

Repeated and acknowledged at Edinburgh before me the undersigned
WM. COULTER, Lord Provost.

In the Presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE,

28th June, 1809.

GRIZEL LYALL, presently residing in Burnt Island in Fifeshire, unmarried, aged about thirty-six years, a Witness produced and sworn, deposes and says, That she was between

eleven and twelve years in the service of Charles Gordon, Esq. of Cluny, as housemaid and in other capacities, until January eighteen hundred and five, when she left it on the marriage of his daughter Miss Charlotte now Lady Johnstone, she having then entered into that Lady's service. That for the year preceding, viz. one thousand eight hundred and four, she was principally employed in attending on Miss Charlotte, but she occasionally attended also on Mr. Gordon's two elder daughters, Miss Johanna and Miss Mary Gordons. And further to the first and third articles of the said Libel this Deponent deposes and says, that she remembers a young gentleman, who commonly went by the name of Captain Dalrymple, used to visit in Mr. Gordon's family in spring one thousand eight hundred and four, and continued his visits while the family resided in Edinburgh; and when they removed to Braid, which was about the end of May or beginning of June she is not sure which, he continued his visits there. That before the family left Edinburgh, she admitted Captain Dalrymple into the house by the front door (by the special order of Miss Gordon) in the evenings. That Miss Gordon's directions to her were, that when she rung her bell once, to come up to her in her bed-room or the dressing-room off it, when she got orders to open the street-door to let in Capt. Dalrymple; or when she (Miss Gordon) rung her bell twice, that the Deponent should thereupon without coming up to her, open the street-door for the same purpose. That agreeably to these directions, she frequently let Capt. Dalrymple into the house about nine, ten, or eleven o'clock at night, without his ever ringing the bell or using the knocker. That the first time he came in this way, she shewed him up stairs to the dressing-room off the young ladies bed-room, where Miss Gordon then was, but that, afterwards, upon her opening the door, he went straight up stairs without speaking to the Deponent, or being shewn up. But how long he continued up stairs she does not know, as she never saw him go out of the house. That the dressing-room above alluded to was on the floor above the drawing-room, and adjoining to the bed-room where the three young ladies slept; and

next to the ladies bed-chamber was another room, in which there was a bedstead with a bed and blankets, but no curtains or sheets to the bed, and it was considered as a lumber-room, the key of which was kept by Miss Gordon; that she never was desired by Miss Gordon to make up the bed in this room, nor ever heard any of the servants say they had done so. Deposposes that she recollects that the family removed from Edinburgh to Braid that year, (eighteen hundred and four) in the evening before a King's Fast, and on a Wednesday, as she thinks, as the fast days are generally held on a Thursday. That at this time, Miss Charlotte was at North Berwick on a visit to Lady Dalrymple. That Mr. Gordon and Miss Mary went to Braid in the evening, but Miss Gordon remained in town, as did also the Deponent and Mr. Robertson the butler, and one or two more of the servants. That she recollects of admitting Captain Dalrymple that evening, as she thinks sometime between ten and twelve o'clock, and he went up stairs to Miss Gordon without speaking to the Deponent. That next morning she went up as usual to Miss Gordon's bed-room, about nine o'clock, and informed her of the hour, and having immediately gone down stairs, Miss Gordon rung her bell sometime after, and on the Deponent going up to her she met her either at the bed-room door, or at the top of the stairs, when she desired the Deponent to look if the street-door was locked or unlocked, and the Deponent having examined, informed her that it was unlocked; and the Deponent immediately after went into the dressing-room, and after being a very short time in it, she heard the street-door shut with more than ordinary force, which having attracted her notice, she opened the window of the dressing-room, which is to the street, and on looking out she observed Capt. Dalrymple walking eastward from Mr. Gordon's house. That from this she suspected that Capt. Dalrymple was the person that had gone out of the house just before. That nobody could have come in by said door, without being admitted by some person within, as the door did not open from without; and she heard of no person having been let into the house on this occasion. That the Deponent having gone down stairs after this, Mr.

Robertson the butler observed to her that *there had been company up stairs last night*, but she did not mention to him any thing of her having let in Capt. Dalrymple the night before, or of her suspicions of his having just before gone out of the house, at least she is not certain, but she recollects of him desiring her to recollect the particular day on which this happened, but of this the Deponent took no particular notice, as she had been in the practice of letting in Capt. Dalrymple so often before. Deposes, That when she went up to Miss Gordon's room in the morning, as above-mentioned, to let her know what o'clock it was, she did not observe any part of a gentleman's apparel, or any thing out of order; that the curtains being close as usual, she could not see into it, but Miss Gordon spoke to her as usual, and nothing occurred at that time that could make her suspect that Capt. Dalrymple was either there or in any of the adjoining rooms. That the Deponent does not recollect of having seen Capt. Dalrymple again that day, after seeing him walking eastward from Mr. Gordon's house as above-mentioned. That she knows that Miss Gordon as well as the Deponent went out to Braid that day, being the King's Fast, before dinner as she thinks; deposes that on that evening or a night or two after, she was desired by Miss Gordon to open the window of the breakfasting parlour to let Capt. Dalrymple in, and she did so accordingly, and found Capt. Dalrymple at the outside of the window when she came to open it; and this she thinks might be between ten and twelve o'clock, and she shewed him up stairs when they were met by Miss Gordon at the door of her bed-chamber, when they two went into the said chamber and the Deponent returned down stairs. That she does not know how long Capt. Dalrymple remained there with Miss Gordon, or when he went away. That the parlour-window was within a few feet of the ground, so that Capt. Dalrymple had no difficulty to get in. That Capt. Dalrymple repeated his visits to Braid, and was admitted in the same way by the Deponent opening the parlour-window for him nine or ten times, and after the first time he always went up stairs by himself, and it was always about the same time of night as above-mentioned,

so far as the Deponent recollects. That Miss Charlotte returned from her visit at North Berwick a few days after Miss Gordon, and the Deponent went out to Braid. That at Braid Miss Gordon and Miss Charlotte slept in one room, and Miss Mary in another. That within Miss Gordon and Miss Charlotte's bed-chamber, there was a dressing-room, the key of which Miss Gordon kept, and she recollects one day of getting the key of it from Miss Gordon to bring her a muff and tippet out of it, and upon going in, she was surprised to find in it a feather-bed lying upon the floor, without either the blankets or sheets upon it, so far as she recollects. That it struck her the more, as she had frequently been in that room before without seeing any bed in it, and as Miss Gordon kept the key she imagined she must have put it there herself. That she found this bed had been taken from the bed-chamber in which Miss Mary slept, it being a double bedded room. That when she observed the said bed in the dressing-room, it was during the time that Capt. Dalrymple was paying his evening visits at Braid as above deposed. Deposposes that upon none of the occasions that she let Capt. Dalrymple into Braid House, did she see him leave it, nor did she know when he departed, but she recollects of being told by Archibald Lock, the gardener, that he had one morning seen Capt. Dalrymple going from the house towards Edinburgh. Deposposes, that the family went to Cluny in September following, and before they set out, she recollects that by Miss Gordon's orders she took the bed that was lying in the dressing-room, and put it into the bedstead that it had been taken from, in Miss Mary's room. Interrogated if from her observations on the beds, either in the house in Edinburgh, or at Braid, or any other circumstance, she conceived that Capt. Dalrymple and Miss Gordon had been in them together? deposposes that she did not think they could have been together in that situation, so far as she could judge. Deposposes that when Capt. Dalrymple paid his visits at Mr. Gordon's house in Edinburgh, he generally was in regimentals, except in the evenings when the Deponent let him in as before deposed to, on which occasions he was generally in a coloured dress. That he had a halt in

his walk, and she understands him to be the Defendant in this Cause, and further or otherwise this Deponent cannot depose to the said positions or articles.

GRIZEL LYALL.

30th June, 1809.

Repeated and acknowledged at Edinburgh, before me the undersigned
Wm. COULTER, Lord Provost of
Edinburgh.

In presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given in behalf of
Mrs. DALRYMPLE.

5th July, 1809.

PETER MCUTCHEON, coachman to Sir George Clerk, of Pennycook, Baronet, married, aged about thirty-three years, a Witness produced and sworn, deposes and says, That he was coachman to Mr. Gordon, of Cluny, for nine years previous to Whitsunday 1805, at which time he left him; and to the first and third articles of the Libel in the above-mentioned action, this Deponent deposes and says, That he remembers of a gentleman who went by the name of Captain Dalrymple, coming frequently about Mr. Gordon's house the year before he left his service, and he thinks his visits began about the beginning of spring, 1804. That Captain Dalrymple was an officer in a regiment of Dragoons then quartered at Piershill Barracks, and he was lame in one of his legs. That Captain Dalrymple and Miss

Johanna Gordon, his master's eldest daughter, used very often to ride out together on horseback, and she rode a dun-coloured horse of Captain Dalrymple's, and she was always attended on these occasions by a servant of her father's. That he never saw Captain Dalrymple and Miss Gordon in a room together, except upon one occasion when Captain Dalrymple dined with Mr. Gordon at his house in St. Andrew's Square, when there was a pretty large company present, and Miss Gordon was one of them, and the Deponent waited at table that day. That he never saw Captain Dalrymple in the house in the evenings. That he continued his visits so long as the family remained in town, which was till about the end of May, or beginning of June, when they removed to Braid House. That he remembers Miss Gordon remained in town that night when Mr. Gordon and Miss Mary removed to Braid House, and the reason he has for remembering this circumstance is, that Mr. Gordon was much out of humour that evening after he went out to Braid, which the Deponent and the other servants attributed to Miss Gordon's remaining in town that night. That, at this time, Miss Charlotte Gordon, the youngest daughter, was on a visit at North Berwick. That he remembers Mr. Robertson the butler, and he thinks Mrs. Lyall, with one or two of the other servants were left in the town-house that night, but the Deponent was at Braid House, having driven Mr. Gordon and Miss Mary out in the coach. Deposposes that Captain Dalrymple's visits at Mr. Gordon's were the subject of much conversation among the servants below stairs, when the Deponent was present; and he remembers it was mentioned, but by whom he does not recollect, that Captain Dalrymple was in the house in St. Andrew's Square that night when Miss Gordon remained in it by herself as above-mentioned, and it was believed that she remained in town that night for the purpose of meeting with him. Deposposes that Miss Gordon came out to Braid the day after the family, and the Deponent recollects of driving her out before dinner. That a few days after this he recollects of having seen Captain Dalrymple early in the morning, at least be-

tween five and six o'clock, walking by himself towards Edinburgh, within a quarter of a mile of Braid House, and he had every appearance of having come from that house; and upon two other mornings about the same time of day, he saw him nearer to Braid House, and walking from it towards Edinburgh. That upon these three occasions Captain Dalrymple was dressed in plain clothes, which was not his usual dress, as he was always in regimentals when he called at Mr. Gordon's any time through the day. That he is quite sure it was Captain Dalrymple that he saw upon the three occasions before-mentioned, although he was at a little distance from him at the time, and he thinks it would be in the course of ten or fourteen days, that he saw him these three mornings going from Braid as above. That from the conversations that took place among the servants, it was believed that a marriage would soon take place between Captain Dalrymple and Miss Gordon, and it was conjectured among the servants, that they had slept together that night Miss Gordon remained by herself in town as above-mentioned. That the Deponent and the rest of the servants thought that Mrs. Lyall knew more of the matter than she told to them, but the Deponent never heard her say that they had slept or been in bed together. Deposes that some days after the family went out to Braid, the Deponent went to North Berwick, and brought Miss Charlotte Gordon home. Deposes that after the family went out to Braid, and about the time that the Deponent saw Captain Dalrymple in the mornings as above, he remembers of hearing Alexander Porteous and John Smith, two of the house servants, complaining that in the mornings they, on different occasions, found the window of the pantry (in which the silver plate and glasses were kept) open, but it never was found out so far as he remembers who had opened the window. Deposes, that after the family removed to Braid, he recollects of Captain Dalrymple coming out in his curricule, and taking Miss Gordon out in it, and this happened several times before the family went North, which he thinks was in the month of September. That he understands Captain Dal-

rymple to be the Defendant in this cause, and further or otherwise this Deponent cannot depose to the said positions or articles.

PETER M'CUTCHEON,

10th July,

Repeated and acknowledged at Edinburgh before me the undersigned
W. M. COULTER, Lord Provost.

In presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

6th July, 1809.

WILLIAM ROBERTSON presently residing in St. David's Street, Edinburgh, married, aged about fifty years, a Witness produced and sworn, deposes and says, That he was in the service of Mr. Gordon of Cluny for seven years previous to Whitsunday 1807 when he left it; and to the first and third articles of the said Libel this Deponent deposes and says, That he remembers of Mr. Dalrymple, who went by the name of Captain Dalrymple, and belonged to a regiment of Dragoon Guards, as he thinks, at that time quartered in Piershill Barracks, coming pretty frequently to Mr. Gordon's house about the month of May and beginning of June in the year 1804, and he dined and supped sometimes with Mr. Gordon, and on these occasions was always dressed in his regimental uniform. That he recollects the family removed from the house in St. Andrew's Square to Braid, on the 6th day of June that year, but Miss

Gordon remained in town that night by herself. ♦ That the Deponent, as well as Grizel Lyall (Miss Gordon's maid) and Elspel Gairns, the scullery maid, remained in town also. That he thinks Miss Gordon was late in coming home that evening, and the Deponent did not see her when she came in. That next morning, being the seventh day of June, and a King's Fast, as he was employed about ten o'clock in the morning in laying up some china in his pantry, which is immediately off the lobby, and assisted by the said Elspel Gairns, he observed Captain Dalrymple come down stairs, and passing through the lobby to the front door, unlocked it and went out and shut the door after him. That Captain Dalrymple was at this time dressed in plain clothes, which was the first time the Deponent had seen him so dressed, but he is perfectly sure he was the man. That the Deponent asked Elspel Gairns, who was standing by, if she knew who it was, to which she answered "perfectly well," and mentioned his name; and the Deponent immediately after he went out, opened the front door, and observed him walking eastwards along the pavement. Deposes, That in about an hour and a half after this Captain Dalrymple returned to the house dressed in his uniform, and breakfasted with Miss Gordon. That on the Deponent going down stairs, after seeing Captain Dalrymple come down stairs and walk out of the house, he observed to Grizel Lyall, that they had had company up stairs last night, to which she answered that she was not sure till she had seen Captain Dalrymple go out of the house that morning, she having opened the window and looked after him. That from what he had thus seen, he was convinced Captain Dalrymple had been in the house all night with Miss Gordon, and that they were either privately married or would soon be married; and he cautioned Elspel Gairns not to mention what she had seen, as the parties had their own ends for keeping it a secret; but it induced the Deponent to make a short minute of what had occurred, in writing which he sealed up and kept in his own possession, and he now produces the same, and it is marked as relative to this his deposition, and it was written by

himself of the date it bears, being 7th June, 1804, that the letters C. D. in said writing means Captain Dalrymple : That he did this that in case the writing should fall into another person's hands it might not be known who was meant. Depos, That Miss Gordon went out to Braid on the said 7th of June, and remained there he believes till the family went to Cluny, but the Deponent did not go to Braid, and therefore does not know what happened there, but he recollects being told by some of the servants that Captain Dalrymple had been seen going from Braid at a very early hour in the morning, and that he had been in Braid House all night, and the Deponent certainly concluded in his own mind that Captain Dalrymple and Miss Gordon had been married. That Captain Dalrymple had a halt in his walk, and the Deponent understands he is the Defendant in this case ; and further or otherwise this Deponent cannot depose to the said depositions or articles.

WILLIAM ROBERTSON.

10th July, 1809.

Repeated and acknowledged at Edinburgh before me the undersigned
WM. COULTER, Lord Provost,

In presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

Edinburgh, 7 June, 1804.

AT ten o'clock this morning saw C — D — coming down the drawing-room stairs, he opened the front door and let himself out. The scullery maid was in the pantry, she had been carreeing up the dishes to be laaid by. I en-

quired of her if she knew how that was, and she said very well, and mentioned his name; this day was the King's Fast.

(Endorsed,)

Edin. 6th July, 1809. This is the minute or writing produced by William Robertson, and referred to in his deposition of this date.

(Signed) WILLIAM ROBERTSON.

In presence of me HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

6th July, 1809.

ALEXANDER PORTEOUS, servant to James Walker, Esq. one of the principal clerks of Session, married, aged about thirty-two years, a Witness produced and sworn, deposes and says, That he was five years in the service of Mr. Gordon of Cluny, as house servant, and left it at Martinmas 1805; and to the first and third articles of the said Libel this Deponent deposes and says, That he remembers a Captain Dalrymple, who belonged to a regiment lying in Piershill Barracks, frequenting Mr. Gordon's house in spring 1804, and that he paid his visits daily and often two or three times a day. That Miss Gordon his master's eldest daughter, used to ride out with him, and generally on a dun horse belonging to him, and it was the general be-

lief among the servants of the family that he was a suitor of Miss Gordon's. That although he went under the name of Captain Dalrymple yet he believes he was only a cornet in his regiment, and he had a halt in his walk. That the Deponent never saw him come to the house late in the evenings. That the family removed from St. Andrew's Square to Braid about the end of May or early in June, and the Deponent went out the same day that Mr. Gordon did, but he remembers that Miss Gordon remained in town that night, and what makes him recollect that circumstance so well was that Mr. Gordon was a good deal out of humour that evening after he went to Braid, which the Deponent and the other servants imputed to Miss Gordon remaining in town by herself that night. That the other two daughters, viz. Miss Mary and Miss Charlotte went out to Braid with Mr. Gordon. Deposes, That after the family went out to Braid Captain Dalrymple frequently visited Miss Gordon in the forenoons, when the Deponent saw him, but he never saw him at Braid either in the evenings or early in the mornings. That the pantry in which the Deponent kept his silver plate and other articles at Braid, was on the first floor of the house, and the window of it was within a foot or two, or a little more, of the surface of the ground on the outside. That while Captain Dalrymple was paying his visits at Braid as above, he found his pantry window open on sundry different occasions when he went into it in the mornings. That the first time he found the window open he was a good deal surprized, and suspected that the house had been broken into, and therefore the first thing he did was to examine all his articles, but on examination he found nothing missing. That in a day or two after having found the window open in the same way in the morning, he mentioned it to the other servants, when he was told that Captain Dalrymple came in or went out that way, and upon this the Deponent was satisfied, but he removed the chest which contained the silver plate and locked it up in a press. That he found his window open at least eight or nine different times, and it was evident to the Deponent that the window

must have been opened from the inside, as he every night closed the shutters and fastened them by an iron band and screw. That Archibald Lock the gardener told the Deponent that one morning he had seen Captain Dalrymple going from Braid House, and Walter Davidson the under gardener told him that he had repeatedly seen that gentleman going from Braid in the mornings when he was going to his work about six o'clock. Deposes, That when Captain Dalrymple paid his visits at Braid in the forenoons it was generally to breakfast, and after Mr. Gordon was gone into Edinburgh to attend his duty as a clerk of Session. That Miss Gordon used to wait breakfast an hour or two till Captain Dalrymple came, and he remarked that Miss Mary Gordon always left the room soon after the captain came, and left him and Miss Gordon by themselves; and from the familiar expressions that he has heard pass between Captain Dalrymple and Miss Gordon, and from his frequent visits he concluded there was more between them than sweethearts; and it was the general opinion of the servants that they either were married or would be married. Deposes, That when Captain Dalrymple used to visit at the house in town he was always dressed in his uniform, but when he visited at Braid he was always dressed in coloured clothes and generally a blue coat and nankeen pantaloons; and further or otherwise this Deponent cannot depose to the said positions or articles.

ALEXANDER PORTEOUS.

10th July, 1809.

Repeated and acknowledged at Edinburgh before me the undersigned
W^M. COULTER, Lord Provost.

In presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

6th July, 1809.

ARCHIBALD LOCK, Gardener - to Mr. Gordon, of Cluny at Braid, married, aged about fifty years, a Witness produced and sworn, deposes and says, That he has been upwards of twenty years in Mr. Gordon's service, and to the first and third articles of the said Libel this Deponent deposes and says, That he recollects of a gentleman who went by the name of Captain Dalrymple, and who was lame in one of his legs, paying frequent visits at Braid in the year 1804, and has seen him and Miss Gordon walking often together, and also riding in a curricule. That he remembers one morning, when he and Walter Davidson were employed in cutting grass on the cross walk near to Braid House, between six and seven o'clock, they observed Captain Dalrymple coming out at the Chinese gate, which is about two hundred yards from the house, and upon his seeing them, he crossed the field and went by Blackford Hill, evidently with a view to shun them. That they were about fifty yards, as he thinks, distant from him when he came out of the gate, and the Deponent was perfectly sure it was Captain Dalrymple from his manner of walking. That Davidson told the Deponent at this time, as well as at other times, that he had on different occasions met Captain Dalrymple in the mornings, about six o'clock, as he was going to his work, and Captain Dalrymple appeared to be coming from Braid House. That Davidson then lived, and still lives at Morning Side, which is on the road between Braid and Edinburgh; that from these circumstances, the Deponent was satisfied Captain Dalrymple was in Braid House during these nights, and he spoke of it to Grizel Lyall, who was waiting maid to the young ladies, but she would give him no satisfaction. That it was the Depo-

nent's opinion, as well as of the other servants with whom he conversed, that Captain Dalrymple and Miss Gordon were either married or going to be married. That the Deponent never saw Captain Dalrymple any other morning, than the one above-mentioned, but saw him frequently through the day as before deposed to; and further or otherwise this Deponent cannot depose to the said position or Articles.

ARCHIBALD LOCK.

10th July, 1809.

Repeated and acknowledged before
me the undersigned

WM. COULTER, Lord Provost.

In the Presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

6th July, 1809.

WALTER DAVIDSON, assistant gardener at Braid, married, aged about thirty-four years, a Witness produced and sworn deposes and says, That he has been nine years in Mr. Gordon's service, and he resides in a house at Morning Side, which is about three quarters of a mile from Braid House, on the Road from Braid to Edinburgh; and to the first and third articles of the said Libel, this Deponent deposes and says, That about five years ago he recollects of a young gentleman who had a halt in his walk, and went by the name of Captain Dalrymple, coming out frequently to Braid House, after the family came out of town; that he once saw him and Miss Gordon riding in a curricule near to Braidburn, but does not recollect seeing them walking toge-

ther. Deposes that he met that gentleman in the mornings, sometimes as he was going to his work from his own house, and passed him, and sometimes he saw him crossing the fields at a little distance, and on all these occasions he was going to all appearance from Braid House towards Edinburgh. That he thinks he may have seen him a dozen of times at least in this way, and it was always between five and six o'clock in the morning; that it was the Deponent's belief that he had come from Braid House, as there was no other place he could come from, and particularly when he saw him crossing the fields, there was no other place he could come from but Mr. Gordon's house. Deposes, that one morning between six and seven o'clock, as Archibald Lock and the Deponent were cutting grass on the walk that leads to Blackford, they observed Captain Dalrymple coming out of the gate at the back of Braid House, which gate he thinks is about two hundred paces to the north east of the house. That when they saw him come out of the gate, he might be distant from them about fifty or sixty yards, and instead of coming to the westward and crossing the field that way, as the Deponent had seen him do before, he struck to the eastward, and went towards Blackford Hill, and the Deponent, as well as Archibald Lock, conceived that he went that way with a view to avoid them: that the gate above-mentioned, is a private entry to and from the house, and only used by Mr. Gordon and the family. And further deposes, that all this happened the year before Miss Charlotte Gordon was married to Captain Johnston, and further or otherwise this Deponent cannot depose to the said positions or articles.

WALTER DAVIDSON.

10th July, 1809.

Repeated and acknowledged at Edinburgh,
before me the undersigned
WM. COULTER, Lord Provost.

In the Presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed,

On the LIBEL and EXHIBITS given on behalf of Mrs.
DALRYMPLE.

8th July, 1809.

JAMES ROY, writer in Edinburgh, aged about thirty years, unmarried, a Witness produced and sworn deposes and says, That he was clerk to Mr. Gordon of Cluny, father of the Plaintiff, for twelve years, and during that time had frequent occasion to pay money to his daughters, and particularly to Miss Johanna the eldest, and Miss Charlotte the youngest, and he was always in the practice of taking receipts from them for the money so paid, and they either wrote and subscribed these receipts themselves, or signed them after being written out by him, and he has also often seen them writing letters and cards, and has received letters from them when they were in the country, and by these means he became well acquainted with their hand-writing; and having examined the Exhibits, Nos. 1, 2, 10, and 11, annexed to the Libel, he deposes and says, That the following words of No. 1, "& I promise the same J. Gordon," are in his opinion of the handwriting and subscription of the Plaintiff, that he thinks the words "a sacred promise" on the back of said Exhibit, are also of her hand-writing, but is not so certain as he is of the other words above quoted; that the words "J. Gordon" upon Exhibit No. 2, are of the hand-writing and subscription of the said Plaintiff. That the words "J. Gordon," upon the Exhibit No. 10, are also the hand-writing and subscription of the Plaintiff: and that the words "Charlotte Gordon," with the word "witness," immediately before them upon said Exhibit No. 10, are the hand-writing and subscription of the aforesaid Charlotte Gordon, now Lady Johnston, and he thinks the letters

"J. G." on the Exhibit No. 11, are of the hand-writing of the Plaintiff; and further or otherwise this Deponent cannot depose.

JAMES ROY.

10th July, 1809.

Repeated and acknowledged at Edinburgh, before me the undersigned
WM. COULTER, Lord Provost.

In the Presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the ALLEGATION and EXHIBITS given on
behalf of Mr. DALRYMPLE.

8th August, 1810
HENRY PERRENNE, of the Five Fields Chelsea,
in the County of Middlesex, Victualler, aged fifty-
three years, a Witness produced and sworn.

1. TO the first article of the said Allegation the Deponent saith, That he lived in the service of the Honourable General William Dalrymple the father of the articulate John William Henry Dalrymple, Esq. Party in this Cause, for eleven years before and down till the month of October or November 1803, in the capacity of Groom of his Chamber, and from that time he lived in the service of the articulate John William Henry Dalrymple, Esq. Party in this Cause, as his servant, and so continued to live in his service till the year 1807. And he saith, that when he first went to live in the

said Honourable General William Dalrymple's service, the said John William Henry Dalrymple, his son, was living with his said father at Chelsea Hospital, in the County of Middlesex, and was then a little boy not more than about seven years of age; and he continued so to live with his said father (who was a widower when the Deponent first knew him) during the whole eleven years the Deponent was in his service as aforesaid, excepting when he the said John William Henry Dalrymple was at Eton College). That in the month of October, or beginning of November in the year 1803, the said John William Henry Dalrymple being a Cornet in his Majesty's Fifth Regiment of Dragoon Guards, went to join the said regiment in York Barracks, and on that occasion the Deponent became his servant, and accompanied him as such to York Barracks, and ever afterwards lived in his service, and was constantly with him till the year 1807. And saith that after the said regiment had been in York Barracks about three months from the time the said John William Henry Dalrymple first joined the same as aforesaid, he removed therewith to Newcastle, where he stayed with the said regiment about two months, and then, to wit in the latter end of the month of March, or beginning of April in the year 1804, he, the said John William Henry Dalrymple proceeded with the said regiment to Scotland, and went into barracks near the city of Edinburgh, attended as aforesaid by the Deponent, and remained there till about the 11th day of July following, when his father, the said Honourable General William Dalrymple came down to Scotland, and then the said John William Henry Dalrymple went on visits with his father to different gentlemen in the neighbourhood of Edinburgh, for a few days, attended by the Deponent; and then at the request of his said father, he the said John William Henry Dalrymple, was ordered on a recruiting party, and went with a part of his said corps on that service, to Halifax in Yorkshire, where the Deponent also attended him, and knows that he left Dunbar, (which was the last place in Scotland the said John William Henry Dalrymple slept at) on the 21st day of the said month of July, 1804, with his said father, on his way to Halifax. And he

further saith, that from having always attended the said John William Henry Dalrymple wherever he went, whilst he the Deponent remained in his service, he can and does of his own knowledge depose, that the said John William Henry Dalrymple did not, at any time reside at any place in Scotland, excepting whilst he was quartered in the said barracks near Edinburgh, and whilst he was visiting with his said father for a few days, between the time of leaving the said barracks and quitting Scotland to go to Halifax as aforesaid. And he also further saith, that he does not of his own knowledge, know any thing concerning the acquaintance of the said John William Henry Dalrymple, Party in this Cause, with the articulate Johanna Gordon now calling herself Dalrymple, nor when the same commenced, further than that he understood from the information he received from different persons, whilst his said master was in the aforesaid barracks near Edinburgh, prior to the arrival of the said General Dalrymple in Scotland, that he had formed an intimacy with the said Johanna Gordon; but he knows that the said John William Henry Dalrymple, Esq. Party in this Cause, was not more than nineteen years of age at such time, and further he cannot depose to the said Article, save that the said John William Henry Dalrymple, Esq. Party in this Cause, never did to the knowledge of this Deponent, cohabit with, or own or acknowledge the said Johanna Gordon, (now calling herself Dalrymple) the other Party in this Cause, as or for his wife, or that she was ever so esteemed or reputed to be, by any person whatsoever.

HENRY PERRENNE.

The same Witness examined on the Interrogatories administered on behalf of Johanna Dalrymple, Party in this Cause.

1. TO the first Interrogatory the Respondent answers, That he was in the service of the Producent, as his own man, from the month of October or November 1803, till the month of June 1807, and did accompany him to Scotland in the

spring of the year 1804. That the Producent remained in Scotland no longer than the 21st day of July in that year, which was the day he left Dunbar, (the last place he stopt at in Scotland) on his way to Halifax. That he never was with the Producent at the house of Charles Gordon, Esq. the father of the Ministrant at Edinburgh, or at his country-seat at Braid, but hath heard and believes that the Producent did often visit at both the said houses, and that many of such visits were made to her, the Ministrant, privately at both those places, and further he cannot answer the said Interrogatory.

2. To the second Interrogatory the Respondent answers, That he never did accompany the Producent, during any visits of his to the Ministrant, and does not of his own knowledge know that he made any such visits, but saith that he was missing several nights from the barracks near Edinburgh, but cannot say on what particular nights, nor on how many he was so missing, but hath heard and believes, that on some of those nights he the Producent was in the house of the Ministrant's father, at Edinburgh or Braid, and that he was privately admitted, and privately retired therefrom, but he knows not, and never heard at what hour the Producent usually arrived at Edinburgh, or at Braid, when on such private visits, or at what hour he retired, except that he was always at morning and evening parades; and further he cannot answer.

HENRY PERRENNE

Same day.

Repeated and acknowledged before
Dr. LUSHINGTON, Surrogate.

PRES. MARK MORLEY,
Notary Public.

On the ALLEGATION and EXHIBITS given on behalf of Mr. DALRYMPLE.

8th August, 1810.

RICHARD TOULMIN NORTH, of Lower Grosvenor Street, in the County of Middlesex, Esq. aged twenty-eight years, a Witness, produced and sworn.

1. TO the first article of the said Allegation the Deponent saith, That he hath known and been intimately acquainted with the articulate John William Henry Dalrymple, Esq. Party in this Cause about six years, and came first to know him after his return to England from Scotland, where he had been with the Fifth Regiment of Dragoon Guards, in which regiment he was an officer. And he saith that he understood and believes that the said John William Henry Dalrymple was and is the son of the Honourable General William Dalrymple, who lived at Chelsea Hospital. And the Deponent once walked with the said John William Henry Dalrymple to his said father's house, but did not go into the same, and never was introduced to his said father. And further to the said article he cannot depose, save that when he first became acquainted with the said John William Henry Dalrymple, he the said John William Henry Dalrymple was about twenty years of age. And save also that since their said acquaintance commenced as aforesaid, he the Deponent never knew the said John William Henry Dalrymple and the articulate Johanna Gordon (now calling herself Dalrymple) Party in this Cause, to live and cohabit together as husband and wife, or ever knew him the said John William Henry Dalrymple to own or acknowledge her as his wife, or that they were ever esteemed or reputed to be husband and wife by any person whatever.

4. To the fourth article of the said Allegation the Depo-

nent saith, That sometime prior to the solemnization of the marriage now to be deposed of, he knew that the said John William Henry Dalrymple, Esq. Party in this Cause, was paying his addresses in the way of marriage to the articulate Laura Dalrymple, then Laura Manners, spinster, and that they were to be married together, and on the evening of the day prior to the day that such marriage was solemnized between them, which happened rather more than two years ago to the best of his recollection, but the particular day of the month he is unable to set forth, he the Deponent received a note or letter from the said John William Henry Dalrymple, informing the Deponent that he was to be married on the next day, and requesting him to be present at the ceremony, and accordingly the Deponent on the next day about the time appointed, went to the said John William Henry Dalrymple's lodgings, and finding that he was gone to the parish church of Saint Mary Le Bone, he followed him there, where he found the said Laura Dalrymple, then Laura Manners, spinster, (whom the Deponent knew to be the daughter of Lady Louisa Manners, by having met her in parties, but had no previous acquaintance with her) and him the said John William Henry Dalrymple, and also a Major Morgan (a friend of the said John Wm. Henry Dalrymple) and a Mr. Robinson a solicitor, and he then and there saw them the said John William Henry Dalrymple, one of the Parties in this Cause, and Laura Manners (now Dalrymple) joined together in holy matrimony, according to the rites and ceremonies of the church of England as by law established, by a priest or minister of the church of England, and minister of the said parish-church (but who was and is a stranger to the Deponent) who then and there pronounced them to be lawful husband and wife in the presence of the Deponent and of the said Major Morgan and Mr. Robinson, who all three signed the entry of the said marriage, made in the register-book of marriages kept for the said parish, as witnesses of the same. And he further saith that he knows the said marriage was so solemnized, in virtue of a licence previously obtained for that purpose (though he knows not from whom it was obtained) and that

at such time he the said John William Henry Dalrymple was of the parish of Saint George Hanover Square, in the County of Middlesex, and upwards of twenty-one years of age, and that he considered himself a bachelor, and free from all matrimonial contracts and engagements, and she the said Laura Dalrymple formerly Manners, was a spinster, and upwards of twenty-one years of age at the time of such aforesaid marriage, and further to the said Article he cannot depose.

5. To the fifth article of the said Allegation and to the Paper-Writing or Exhibit marked with the letter (C) therein pleaded and propounded to be and contain a true copy of the entry of the marriage of them the said John William Henry Dalrymple and Laura Manners (now Dalrymple) the same having been now produced and shewn to the Deponent, and carefully viewed and perused by him, he saith that he is certain that John William Henry Dalrymple, whose name appears thereto, and is by mistake called in the body of the said Exhibit John Dalrymple Esq. and John William Henry Dalrymple, Esq. the Party in this Cause, whom he as aforesaid saw married to the said Laura Manners now Dalrymple, was and is one and the same person and not divers, and further to the said Article he cannot depose.

6. To the sixth article of the said Allegation the Deponent saith, That immediately after the solemnization of the said marriage they the said John William Henry Dalrymple and Laura Dalrymple his wife, went to live and cohabit together at bed and board as lawful husband and wife, and as he believes consummated their said marriage, and they so lived and cohabited together at various places, viz. at Stratford Place and Portman Square, in the County of Middlesex, and other places, at both which places he the Deponent hath many times visited them, and he still continues to visit them at the last mentioned place, where they at this present time live and cohabit together as lawful husband and wife. And he further saith that ever since they the said John William Henry Dalrymple and Laura Dalrymple have so lived and cohabited together, they have constantly and upon all occasions owned and acknowledged, and do at this present time own and ac-

knowledge each other as and for lawful husband and wife, and they were and are so commonly accounted, reputed, and taken to be by and amongst their neighbours, friends, acquaintances and others, and are visited as such. And further he cannot depose.

R. T. NORTH.

Same day,

Repeated and acknowledged before
Dr. PARSON, Surrogate.

PRES. MARK MORLEY,
Not. Pub.

On the ALLEGATION and EXHIBITS given on behalf
of Mr. DALRYMPLE.

20th August 1810.

ADAM ORMSBY, Esq. Captain in his Majesty's Fifth Regiment of Dragoon Guards, at present in Colchester, in the County of Essex, aged twenty-eight years, a Witness, produced and sworn.

1. TO the first article of the said Allegation the Deponent saith, That he is Captain in his Majesty's Fifth Regiment of Dragoon Guards, and hath so been for about six years and a half past. That being with the troop which he commanded in the said regiment at Newcastle upon Tyne, about two or three months prior to the 25th day of March 1804, he was at that time and place joined by the articulate John William Henry Dalrymple, Party in this Cause, who was then appointed a Cornet in his the Deponent's said Troop, and whom the Deponent at that time understood to be the son of the

Honourable General William Dalrymple, though such was the first time he had ever been introduced to him, and after being so at Newcastle upon Tyne together about two or three months with the said troop which the Deponent commanded, they marched therewith from Newcastle upon Tyne to Piers-hill Barracks, near Edinburgh, on the 25th day of March, in the said year 1804, which barracks they did not reach till the fifth day of April in the same year, and he the said John William Henry Dalrymple remained from that time with the said troop quartered in the said barracks for about two or three months, to the best of the Deponent's recollection, and then he was sent to Dunbar in Scotland, shortly after which (but the precise time the Deponent is unable to set forth) he the said John William Henry Dalrymple Esq. was sent on the recruiting service into Yorkshire, and save his being so as aforesaid quartered, the Deponent is certain that the said John William Henry Dalrymple did not at any time since the Deponent's first knowledge of him reside at any place in Scotland previous to being so sent into Yorkshire on the recruiting service ; And this Deponent further saith that at the time he the said John William Henry Dalrymple, so as aforesaid, joined the said regiment at Newcastle upon Tyne, and when he was with the same in Scotland as aforesaid, he was a young man, under the age of twenty-one years, and as the Deponent verily believes not more than about nineteen years of age, and the Deponent never knew or understood that he the said John William Henry Dalrymple and the articulate Johanna Gordon ever cohabited together as lawful husband and wife, or that they were ever esteemed or reputed so to be by any persons whatever. And further he cannot depose to the said article.

A. ORMSBY, Capt. 5th D. Gds.

Same day,

Repeated and acknowledged before
Dr. STODDART, Surrogate.

Pres. MARK MORLEY,
Not. Pub.

On the ALLEGATION and EXHIBITS given on behalf
of Mr. DALRYMPLE.

27th August, 1810.

HENRY BROWN, at present employed as a labourer
in the Hon. East India Company's Warehouses in
Fenchurch Street, London, aged thirty years, a
Witness produced and sworn.

1. TO the first article of the said Allegation the Deponent saith, That in the latter end of the year 1803, and beginning of the year 1804, he lived in the service of a Mr. Surtees a solicitor at Newcastle upon Tyne, and first came to know the person of the articulate John William Henry Dalrymple, Esq. Party in this Cause, early in the said year 1804, and about three months before his Majesty's Fifth Regiment of Dragoon Guards, which was quartered at Newcastle upon Tyne, marched from that place for Scotland, and which, to the best of his recollection happened in the latter end of the month of March, or beginning of the month of April, in that year, he the said John William Henry Dalrymple having joined the said regiment at Newcastle aforesaid, as a cornet therein, and being in consequence thereof often seen by the Deponent whilst the said regiment lay at Newcastle subsequently to his having so joined the same in the early part of the said year, that he well remembers the said regiment so as aforesaid, marched from Newcastle upon Tyne for Scotland, at or about the time before set forth, and that the troop to which the said John William Henry Dalrymple was appointed, also marched therewith; and he this Deponent having afterwards given warning to leave the place he was so in at Newcastle, and having received information that the said John William Henry Dalrymple Party in this Cause (who was then at Piershill Barracks with his Majesty's said Regiment of Dragoon Guards) was in want of a groom,

he proceeded from Newcastle aforesaid, to Piershill Barracks to get such place in the said John William Henry Dalrymple's service, and was accordingly engaged by him, and entered his service as his groom on the 10th day of the month of May, in the said year 1804, and continued therein about three years and two months; and he saith that it was his constant duty to ride with the said John William Henry Dalrymple whenever he went out on horseback, or in his curricie, after the Deponent so entered his service, and from so being constantly with his said master, knows that he remained quartered with the said regiment in Piershill Barracks for about a month after the Deponent so first entered his service, and that he then marched with part of the said regiment from thence to Belhaven barracks near Dunbar, attended by the Deponent and Henry Perrenne his valet, where he remained quartered there about six weeks, and then (to wit) on the 21st day of July, in the said year 1804, he the said John William Henry Dalrymple, proceeded from the last mentioned place with his father, the Honourable General Dalrymple for Yorkshire, being ordered to join a part of the said regiment then on the recruiting service at Halifax, and the Deponent followed his said master on the next day with the curricie and his horses, and joined him in Yorkshire, and he is certain that the said John William Henry Dalrymple, Party in this Cause, did not reside at any place in Scotland from the time of the Deponent's first knowledge of him as aforesaid, and during the whole time the Deponent so remained in such his service, save and except, whilst he the said John William Henry Dalrymple was, as aforesaid, quartered in barracks in that country; and further saith, to the said article, he cannot depose save that the said John William Henry Dalrymple was only about nineteen years of age when the Deponent went into his service as aforesaid, and that he does not know, never heard, and does not believe that the said John William Henry Dalrymple, Party in this Cause, and the articulate Johanna Gordon ever lived, or cohabited together as lawful husband and wife, or that they were ever esteemed or reputed so to be by any person whatever.

HENRY BROWN.

The same Witness examined on the Interrogatories administered on behalf of Johanna Dalrymple, Party in this Cause.

1. TO the first Interrogatory the Respondent answers, That he was in the service of the said Producent as his groom, for about three years and two months, from the 10th day of May, 1804, at which last mentioned time, the Respondent joined him at Piershill Barracks near Edinburgh, and he knows that the Producent did not remain longer in Scotland than the 21st day of July 1804, when he left Belhaven barracks near Dunbar, to go on the recruiting service at Halifax; That the Producent (whilst he so remained in Scotland) was in the frequent habit of visiting at the house of Charles Gordon, Esq. the Father of the Ministrant, both at Edinburgh and at his country house about two miles, or two miles and a half from that city, the name of which place he knows not, but he does not know, and hath no reason to believe that such visits were made to the Ministrant privately, excepting that he the Producent used to tell the Respondent, when he went with notes to the said Johanna Gordon, to take care and not let her father see him the Respondent; for he saith, that in other respects the Producent's visits to the Ministrant appeared to have been made openly and publicly, as he used to go in the day time, and they were in the habit of riding out together in the Producent's curricule frequently, and further he cannot depose.

2. To the second Interrogatory the Respondent answers, That he often accompanied the Producent during such his visits to her father's house at Edinburgh, but he cannot set forth the days upon which it was he so attended the Producent there, except that it was between the said 10th of May and 18th of July 1804, for he saith, that on the said 18th of July, he attended the Producent his master to the said Charles Gordon's country house near Edinburgh, where he the Producent dined, which was the only time the Respondent accompanied him there. And he saith that on the night of the said 18th of July (which was the last time the

Producent was in or near Edinburgh in the said year 1804) the Respondent by the orders of his said master, waited with the curricie at the said house of the said Charles Gordon, Esq. till about twelve o'clock, when he the Producent came out of the said house, and got into the curricie and rode away therein about a mile on the road towards Edinburgh, and then he desired the Respondent to stop, and having told the Respondent to go and put up his horses at Edinburgh, and to meet him again at that same spot at six o'clock the next morning with the curricie, he the Producent then got out and walked back towards the said Charles Gordon's house, and the Respondent accordingly on the next morning at six o'clock met the Producent at the appointed spot, and brought him in his said curricie to Haddington, from whence he went in a chaise to the house of a Mr. Nisbet in the neighbourhood of that town, where the Producent's father was was then staying; that from what he hath herein before deposed, he does believe that the Producent did on the night of the said 18th of July go back to and remain in the said Mr. Gordon's country house, and excepting on that occasion he saith he hath no knowledge whatever from information or otherwise, and cannot form any belief whether the Producent was during any other night, at either of the said Mr. Gordon's said houses, nor whether he was or was not privately admitted, or did or did not privately retire therefrom, and further to the said Interrogatory he cannot answer.

HENRY BROWN.

Same day,

Repeated and acknowledged before
Dr. DAUBENY Surrogate.

Pres. MARK MORLEY,
Notary Public.

On the ALLEGATION and EXHIBITS given on behalf
of Mr. DALRYMPLE.

29th August, 1810.

WILLIAM BOOKER CHADWICK, of Doctors
Commons London, Gentleman, aged upwards of
thirty-four years, a Witness produced and sworn.

5. TO the fifth article of the said Allegation and to the Paper Writing or Exhibit marked with the letter (C) therein pleaded, and to the said Allegation annexed, the Deponent saith that on the fourth day of November last, he did attend and search the register-book of marriages, kept for the parish of St. Mary-le-bone, in the county of Middlesex, for the original entry therein of the marriage of John William Henry Dalrymple, Esq. and Laura Manners, and having found the same, he did take an exact copy thereof, and did afterwards carefully examine and compare the same with its said original, remaining in the said register book and did find the same to agree therewith, and in testimony thereof he did write and subscribe his name to a certificate to that effect at the foot or bottom of such certificate, and the Deponent having now been shewn, and having carefully viewed and perused the said Paper Writing or Exhibit marked (C) he saith that the whole body series and contents of the said Exhibit, and the name "W. B. Chadwick," set and subscribed to the certificate written at the bottom thereof, were and are all of the proper hand-writing and subscription of him the Deponent, and he thereby knows the same to be the very same copy of the entry of the aforesaid marriage, which he copied from and afterwards carefully examined and collated and found to agree with the aforesaid original entry thereof remaining in the register book of marriages, kept for

he said parish of St. Mary-le-bone, at the time and in the manner hereinbefore deposed, and further he cannot depose.

W. B. CHADWICK.

Same day,

Repeated and acknowledged before
Dr. STODDART, Surrogate.

Pres. MARK MORLEY,
Notary Public.

On the ALLEGATION and EXHIBITS given on behalf
of Mr. DALRYMPLE.

29th August, 1810.

GEORGE ROBINSON of Stratton Street, Piccadilly
in the County of Middlesex, Esq. aged thirty-four
years, a Witness produced and sworn.

4. TO the fourth article of the said Allegation the Deponent saith, that he hath known the articulate Laura Dalrymple, formerly Laura Manners, Spinster, wife of John William Henry Dalrymple, Esq. Party in this Cause, for several years last past, and when she was about to be married to her said husband (to wit) sometime in or about the month of May in the said year 1808, he the Deponent being in the profession of the law, was employed to prepare the settlement which was made and entered into on that occasion, in consequence whereof he became acquainted with him the said John William Henry Dalrymple, Party in this Cause, and

when the said parties were married he was present at the ceremony, and gave her the said Laura Dalrymple, then Laura Manners Spinster away, and he saith that they the said John William Henry Dalrymple and Laura Dalrymple were so married on the second day of June in the said year 1808, according to the rites and ceremonies of the church of England, as by law established, in the parish church of St. Mary-le-bone in the county of Middlesex, by a priest or minister in holy orders of the said church, in pursuance of a licence duly obtained for that purpose from the proper office at Doctors Commons, and at the aforesaid ceremony, there were also present a Mr. North and a Major Morgan, who with the Deponent subscribed their names as witnesses to the entry of the said marriage, then duly made and entered in the register-book of marriages, kept for the said parish; and he further saith, that at the time of the aforesaid marriage, she the said Laura Dalrymple was living with her sister, the Dutchesse of St. Albans, in Stratford Place, in the parish of St. Mary-le-bone, and was a Spinster, and upwards of twenty-one years of age, and for any thing the Deponent knows to the contrary, the said John William Henry Dalrymple was a bachelor, and upwards of twenty-one years of age, and further to the said article he cannot depose.

5. To the fifth article of the said Allegation, and to the paper writing or Exhibit marked with the letter (C) therein pleaded to be and contain a true copy of the entry of the marriage of them the said John William Henry Dalrymple, Esq. party in this cause, and Laura Dalrymple, formerly Manners, the same having been now produced and shewn to, and carefully viewed and perused by the Deponent, he saith that he hath not a doubt but does verily believe from the purport and contents of the said Exhibit, that John William Henry Dalrymple whose name appears subscribed thereto, and who is by mistake called in the body of the said Exhibit, John Dalrymple, Esq. and John William Henry Dalrymple, Esq. the Party in this Cause, hereinbefore deposed of particularly, was and is one and the same person and not divers, and further to the said article he cannot depose.

6. To the sixth article of the said Allegation, the Deponent

saith, That immediately after the solemnization of the said marriage, they the said John William Henry Dalrymple, Esq. and Laura Dalrymple his wife set off together for Rochester as he believes, and on their return to London, took up their abode at the Clarendon hotel in Bond Street, and afterwards in Portman Square, where they at present live and reside; and at both which places the Deponent hath often dined with them, and he saith that ever since their said marriage, they have lived and cohabited, and still do live and cohabit together in every respect as lawful husband and wife, which they have always owned and acknowledged each other to be, and as, and for such they have always been and still are visited, an commonly accounted, reputed, and taken to be by and amongst their neighbours, friends, acquaintances and others, and further he cannot depose.

G. ROBINSON.

Same day,

Repeated and acknowledged before

Dr. STODDART, Surrogate.

Pres. MARK MORLEY,

Notary Public.

On the ALLEGATION and EXHIBITS given on behalf
of Mr. DALRYMPLE.

15th December, 1810.

GEORGE WYNDHAM, Esq. a Captain in his
Majesty's First Regiment of Foot Guards, aged
twenty-three years, a Witness produced and sworn.

1. TO the first article of the said Allegation the Deponent saith, That he hath known the articulate John William Henry Dalrymple, Esq. Party in this Cause, for upwards of

ten years last past whilst he lived with his father the Hon. General William Dalrymple at Chelsea Hospital, where he continued to live and reside with his said father till he joined his Majesty's Fifth Regiment of Dragoon Guards as a cornet, as will be hereafter deposed, and he saith that he was himself a cornet in his Majesty's said Fifth Regiment of Dragoon Guards, and was with the said regiment when the said John William Henry Dalrymple joined the same as a cornet, on or about the 26th of October 1803, at York, after which time (to wit) in the month of December in the same year, he the said John William Henry Dalrymple, marched with the troop to which he belonged to Newcastle upon Tyne, from whence he afterwards marched with his said troop to Scotland, where he arrived in the latter end of March, or beginning of April in the year 1804, and went with the said regiment into Piershill Barracks near Edinburgh, where the Deponent joined the said regiment in a few days afterwards, and knows that during the months of April, May, and June, and part of the month of July, in the said year 1804, he the said John William Henry Dalrymple was quartered in Piershill Barracks aforesaid, and at other places near thereto, and that on or about the 14th day of the said month of July he the said John William Henry Dalrymple, in consequence of orders which he received for that purpose removed with part of his said corps to Halifax in Yorkshire on the recruiting service, and the Deponent is certain from the knowledge he had of, and his acquaintance with the said John William Henry Dalrymple, Party in this Cause, that except his being as aforesaid quartered with his said regiment in Piershill Barracks and in the neighbourhood thereof, he never resided in Scotland down to the time he the Deponent went to Ireland in the month of April, or May 1805, and he further saith that he very well knew that the said John William Henry Dalrymple became acquainted and was intimate with the articulate Johanna Gordon, whilst he so as aforesaid remained with his regiment in the said barracks near Edinburgh, at which time he was not more than about nineteen years of age, but the Deponent never knew that the said

John William Henry Dalrymple cohabited with her the said Johanna Gordon as his wife, or that they were ever considered or reputed to be lawful husband and wife by any person whatever, and further he cannot depose.

3. To the third article of the said Allegation and to the Paper-Writings or Exhibits marked (A and B) therein pleaded and referred to, the Deponent saith, That he also knew and was well acquainted with the articulate Johanna Gordon whilst he remained in Scotland, which was till about two or three months after the said John William Henry Dalrymple went as aforesaid to Halifax, and though he does not remember ever to have seen her write, he hath seen many letters of her writing to the said John William Henry Dalrymple, and he once received a letter from her himself, and judging from the similitude of the hand-writing of the said two Paper-Writings, marked (A and B) which are now produced and shewn to him to that of the aforesaid letter which he received from the said Johanna Gordon, and those which were sent to the said John William Henry Dalrymple, he is of opinion and believes that the whole body, series and contents of the said two Exhibits marked (A. and B.) the latter of which is contained in two separate pieces of paper, and both marked (B) and the subscription to the first of the said Exhibits and the superscription on both were and are of the hand-writing and subscription of the same person who wrote and sent the aforesaid letter to him the Deponent, and and those to the aforesaid John William Henry Dalrymple, namely, of the hand-writing of the articulate Johanna Gordon, who lived at Edinburgh, and at Braid near Edinburgh at the time he as aforesaid knew her, and further to the said article he cannot depose.

6. To the sixth article of the said Allegation the Deponent saith, That since he quitted the said fifth regiment of Dragoons in the year 1805, he hath been abroad, and on his return to England, about two years ago or rather more, he found that the said John William Henry Dalrymple, Party in this Cause was married to Miss Laura Manners, the daughter of the late Sir William Manners, and that they were living and

cohabiting together as lawful husband and wife at the Clarendon Hotel in Bond Street, in the county of Middlesex, where the Deponent was introduced by the said John William Henry Dalrymple to his said wife, and afterwards to wit in the summer before last he met them at Brighthelmstone, where he often dined with and visited them, since which he hath many times visited and dined with them at their house in Portman Square, and is still in the habit of so doing, and well knows that the said John William Henry Dalrymple and Laura Dalrymple formerly Manners his wife, have during all the time aforesaid lived and cohabited together as lawful husband and wife and still continues so to do, and that they constantly owned and acknowledged each other as and for lawful husband and wife, and are so commonly reputed, accounted and taken to be by and amongst their neighbours, friends, acquaintances and others, and further he cannot depose.

G. WYNDHAM.

Same day,

Repeated and acknowledged before

Dr. DAUBENY, Surrogate.

Pres. MARK MORLEY,
Notary Public.

On the ALLEGATION and EXHIBITS given on
behalf of Mr. DALRYMPLE.

17th December, 1810.

CHARLES CATCHMAYD MORGAN, of No.
21, Howland Street, Fitzroy Square, in the County
of Middlesex, aged thirty-one years, a Witness
produced and sworn.

4. To the fourth article of the said Allegation the Deponent saith, that he hath known and been intimately acquainted with the articulate John William Henry Dalrym-

ple Esq. Party in this Cause for many years, and prior to to his marriage with the articulate Laura Manners now Laura Dalrymple his wife; knew that he the said John William Henry Dalrymple was paying his addresses to her in the way of marriage, and that they were to be married, though he the Deponent had not then seen the said lady; and he saith that when the time for such marriage being solemnized between the said John William Henry Dalrymple and Laura Manners now Dalrymple had been fixed and agreed upon, he the Deponent was invited to be present at that ceremony by him the said John William Henry Dalrymple, and accordingly attended and was present thereat, and for that purpose went and met the said parties at the parish church of St. Mary-le-bone in the county of Middlesex where they were so to be married, and he was then and there, to wit, on or about the 2d or 3d day of June in the Year 1808 introduced by the said John William Henry Dalrymple to the said Miss Laura Manners his then intended wife, and he then and there saw him the said John William Henry Dalrymple Party in this Cause married to the said Laura Manners now Laura Dalrymple, according to the rites and ceremonies of the church of England as by law established, by a priest or minister in holy orders of the said church, in pursuance of a licence previously obtained for that purpose; at which ceremony there were also present a Mr. North and a Mr. Robinson, two friends of the said John William Henry Dalrymple; And he further saith that at the time such marriage was as aforesaid solemnized, he the said John William Henry Dalrymple was a bachelor, and upwards of twenty-one years of age as he the Deponent verily believes, and was living in lodgings in Conduit Street, in the parish of St. George Hanover Square, in the county of Middlesex, and she the said Laura Manners now Dalrymple was till then living with her sister the Duchess of St. Alban's, in Stratford Place in the parish of St. Mary-le-bone aforesaid as he believes, and further to the said article he cannot depose.

5. To the fifth article of the said Allegation and to the Paper-Writing or Exhibit marked with the letter (C) therein

pleaded and referred to, as containing a true copy of the entry of the marriage of them the said John William Henry Dalrymple Esq. and Laura Dalrymple, formerly Manners, hereinbefore deposed of, the Deponent saith that at the time he as aforesaid saw the said two persons married, he attested the original entry of the said marriage which he then saw made and entered in the register-book of marriages kept for the said parish, as one of the witnesses thereof, and the said Paper-Writing or Exhibit marked with the letter (C) having been now produced and shewn to the Deponent, and he having carefully viewed and perused the same, he saith that he hath not the least doubt but very well knows and is certain that John William Henry Dalrymple whose name appears subscribed to the original entry of which the said Exhibit purports to be a copy, and who is by mistake called in the body of the said Exhibit "John Dalrymple Esq." and John William Henry Dalrymple Esq. Party in this Cause by him the Deponent herein-before deposed of, was and is one and the same person, and not divers, and further to the said article he cannot depose.

6. To the sixth article of the said Allegation the Deponent saith, That immediately after their said marriage, they the said John William Henry Dalrymple Esq. and Laura Dalrymple his wife went to Rochester, where they consummated their said marriage, and where the Deponent afterwards joined them and remained with them some days; after which they the said John William Henry Dalrymple and Laura Dalrymple went together to Brighthelmstone, but the Deponent did not go with them there, since which they have lived together at divers places, particularly in Stratford Place and Portman Square in the county of Middlesex, at both which last-mentioned places he hath visited them, and he knows that they then and there lived and co-habited together in every respect as lawful husband and wife, and that they still continue so to live and cohabit together in Portman Square aforesaid, where the Deponent is still in the habit of visiting them; and he lastly saith that ever since their said marriage, they the said John William Henry Dalrymple and Laura Dalrymple his

wife, have constantly owned and acknowledged each other as lawful husband and wife, and were and are so commonly accounted, reputed, and taken to be by and amongst their neighbours, friends, acquaintances and others, and further he cannot depose.

CHARLES C. MORGAN.

Same day,

Repeated and acknowledged before
Dr. STODDART, Surrogate.

Pres. MARK MORLEY,
Notary Public.

On the ALLEGATION and EXHIBITS given on
behalf of Mr. DALRYMPLE.

18th January, 1811.

CHARLES JOHNSON one of the two chief clerks
in the Secretary's Office, at the General Post Office
London, aged thirty-five years, a Witness produced
and sworn.

3. TO the third article of the said Allegation, and to the Paper-Writings or Exhibits, marked (A) and (B) therein pleaded to be and contain two original letters written and sent by Johanna Gordon to Samuel Hawkins Esq. at the Grand Parade Brighthelmstone, the Deponent saith, That he is one of the chief clerks in the Secretary's Office at the General Post Office London, and hath so been for about seven years last past, and he hath been in the department

of the said Secretary's Office altogether for about eighteen years last past, and it being a part of his duty to attend to the complaints of irregularities in respect to letters passing through the General Post Office London, he has thereby become thoroughly acquainted with the stamps used, and other official marks put upon letters passing by the General Post, and the Deponent having now been shewn and having carefully viewed the said Paper-Writing or Exhibit marked (A), which purports to be a letter dated "Ballencrieff House by Haddington, November 19th, 1807," he saith that the said letter bears the post mark of "Haddington" thereon, from which the Deponent is certain that it was forwarded by the General Post from Haddington through London to Brighthelmstone, (the place to which it appears addressed) by reason that the said letter hath also the London morning stamp thereon, which is a red mark or stamp, and is used to denote the day of arrival in London on its way to the ultimate place of destination, but such latter stamp being made so imperfectly on the said letter, he cannot distinctly make out the date thereof, but thinks it is "November 23." And the Deponent having now also carefully viewed and perused the said Exhibit marked (B), which is contained in two separate pieces of Paper having the mark (B), and purports to be a letter dated "Edinburgh, May 9th, 1808" the Deponent saith that from the mark or stamp thereon, he is certain that the said letter was put in at or passed through the General Post Office London, on the evening of the 12th day of May, 1808, as there is the London Post mark of that evening clearly appearing thereon, which is a black mark or stamp, and he is further confirmed in his said opinion from the circumstance of the said letter appearing to be franked by a member of the House of Commons on that day, which frank is written at the back thereof. And he lastly saith that the said letter hath also the Brighton post mark thereon, from which circumstance he is certain that the said letter was not delivered to the person to whom it appears addressed at Brighthelmstone, but passed by the General Post from Brighton to another place to be delivered, which the Depo-

ment hath no doubt was Findon near Shoreham from the original superscription of such letter appearing to be altered to the place last-mentioned; and further he cannot depose.

CHARLES JOHNSON

Same day,

Repeated and acknowledged before
Dr DAUBENY, Surrogate.

Pres. MARK MORLEY,
Notary Public.

On the ALLEGATION and EXHIBITS given on
behalf of Mr. DALRYMPLE.

12th October, 1810.
JAMES ROBERTSON Esq. of the city of Edinburgh, writer to his Majesty's signet, aged forty-six years a Witness produced and sworn.

TO the third article of the said Allegation, the Deponent having attentively and deliberately examined and considered the two letters or Exhibits annexed to the said Allegation and marked with the letters A. and B, he deposes and says, that he is well acquainted with the hand-writing of the said Johanna Dalrymple Promoter of this Cause, and has frequently seen her write and subscribe her name, and that he verily believes that the whole body, series and contents of the said two Exhibits, the subscription to the first of the said Exhibits, and the original superscription on both are of the

proper hand-writing and subscription of the said Johanna Dalrymple, and that "Mr. Dalrymple" "Mr. D." and "he" mentioned in the said letters and John William Henry Dalrymple Party in this Cause, was and is the same person and not divers, and that Johanna Gordon who wrote and sent the said letters, and Johanna Gordon calling herself Dalrymple and wife of the said John William Henry Dalrymple, was and is the same person and not divers.

JAMES ROBERTSON.

12th October, 1810.

Repeated and acknowledged at Edinburgh before me the undersigned
W^M. CALDER, Provost.

In Presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.



On the ALLEGATION and EXHIBITS given on behalf
of Mr. DALRYMPLE.



15th October, 1810.

JAMES ROY, writer in Edinburgh, and at present
a clerk in the Comptroller's Office in the Excise
Edinburgh, aged upwards of thirty years, a Wit-
ness produced and sworn.

TO the third article of the said Allegation, the Deponent
having carefully perused and examined the two Letters or
Exhibits annexed to the said Allegation, and marked with

the letters A and B, he deposes and says, that having been for a good many years clerk to Charles Gordon, Esq. of Cluny, father of Johanna Gordon or Dalrymple, the Plaintiff or Promoter of this Cause, he has frequently seen her write and also subscribe her name to receipts, and by that means is acquainted with her writing, and he is clearly of opinion and verily believes that the whole body series and contents of the said two Letters or Exhibits, the subscription to the first of the said Exhibits, and the original superscription on both of them are of the proper hand-writing and subscription of the said Johanna Gordon or Dalrymple, and that the words "Mr. Dalrymple," "Mr. D," and "he" mentioned in the said letters, and John William Henry Dalrymple Party in this Cause was and is the same person and not divers, and that Johanna Gordon the writer of these letters, and Johanna Gordon calling herself Dalrymple, and wife of the said John William Henry Dalrymple, was and is the same person and not divers.

JAMES ROY.

24th November, 1810.

Repeated and acknowledged at Edinburgh before me the undersigned
WM. CALDER, Provost.

In presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the ALLEGATION and EXHIBITS given on behalf
of Mr. DALRYMPLE.

7th November, 1810.

DAVID WARDLAW, of the city of Edinburgh,
writer, aged thirty-seven years, a Witness pro-
duced and sworn.

TO the second article of the said Allegation the Deponent deposes and says, That he has searched the Records of the Commissary Court of Edinburgh, which is the supreme Consistorial Court of Scotland, from the first day of January 1804 to the first day of September last in this present year 1810, and hath ascertained that no legal measures were taken in said court between the said dates, by the Complainant or Promoter Johanna Gordon or Dalrymple, either to prevent the marriage of the Defendant John William Henry Dalrymple Esq. with a person other than her, or to enforce solemnization of marriage between the said John William Henry Dalrymple Esq. and herself. And he farther deposes and says, That he was bred to the practice of the Consistorial Courts of Scotland, and knows that if any legal measure such as is above referred to had been taken by the said Johanna Gordon in Scotland, it behoved to have been discovered by him in the search which he has made in the Records of the Commissary Court of Edinburgh as above deposed to; and further or otherwise the Deponent cannot depose to the said article.

DAVID WARDLAW.

26th November, 1810.

Repeated and acknowledged at Edin-
burgh before me the undersigned
WM. CALDER, Provost.

In presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the ALLEGATION and EXHIBITS given on behalf
of Mr. DALRYMPLE.

31st October, 1810.

JOHN CLERK Esq. of the city of Edinburgh,
Advocate and for some time his Majesty's Solicitor
General for Scotland, aged about fifty-three years,
a Witness produced and sworn.

DEPOSES and says, That he has practised as an Advocate before the supreme Court of Session in Scotland since the year 1785, and to the seventh article of the said Allegation, the Deponent having attentively and deliberately perused and considered the several articles of the said Allegation with the Exhibits annexed thereto, and also the Libel given in the said Cause on the part of Johanna Dalrymple the Promoter, and the original Exhibits, Nos. 1, 2, 10, and 11, and the several original Letters annexed to the said Libel, he deposes and says, That in his opinion a person not having resided in Scotland otherwise than as being quartered there as a military officer, is not through such residence a domiciled resident. That the laws and usages of Scotland apply generally to persons actually resident within the country who contract marriages according to the methods and forms that would be binding upon the domiciled inhabitants, but that in cases where a marriage is alleged to have been contracted without having been solemnized in the face of the church, and the question depends upon evidence of consent to the matrimonial contract, persons who are not domiciled residents may be in a different situation from the domiciled inhabitants; There may be acknowledgments or declarations of marriage intended merely as engagements to marry at some future period, or where the parties live together publicly, to give their connection a

more decent and respectable appearance in the eyes of the world, such cases occur in Scotland notwithstanding the danger to parties of being entangled in marriages without their consent by the law, which admits of private marriages without the marriage ceremony, the acknowledgments or appearances of marriage being taken as evidence of it, but the Deponent has been informed that in England where private acknowledgments of marriage without the ceremony do not bind parties to the matrimonial contract, and consequently it is safer to pretend the connection of marriage where it does not exist, such pretended marriages are not unfrequently formed without an intention to marry, and particularly that this is a practice in the army ; Thus when a regiment comes from England to be quartered in Scotland, the same habits continue among the officers and soldiers who have women along with them who pass as their wives, though the connection is in reality of a more temporary nature : From this it should follow, that the same circumstances that would infer consent to marriage in a domiciled inhabitant in Scotland, would in fact carry no such inference along with it against an English officer or soldier following the habits of his country ; Thus though it cannot be said that these persons while they remain in Scotland are not subject to the same law that applies to others, they have some advantage in weighing the evidence of consent to marry, where it is alleged that they have contracted private or irregular marriages : That the Deponent is of opinion that the Paper-Writing, No. 1, does not amount to or constitute a marriage, as it is in its form a mere promise : The Letters annexed to the Libel do not amount to or constitute a marriage, but they may be considered as important evidence in support of an allegation that a marriage had been contracted by the parties ; The Deponent does not however consider them to be decisive evidence ; some of them are written in Scotland and others in England ; The Deponent cannot distinguish between these letters as to their effect in evidence from the place where they were written ; a letter written in England may afford material evidence, but it

would not constitute a marriage ; and the letters written in Scotland, have in the Deponent's opinion, no stronger effect than if they had been written in England. The Paper-Writing, No. 11, seems to have been an envelope, and the words of it " sacred promises and engagements," to which the parties appear to have put their initials, import that when it was written there was no marriage between them, but only promises and engagements to marry. The Paper-Writing, No. 2, imports a mutual declaration of marriage by John Dalrymple and Johanna Gordon ; If these declarations are in the hand-writing of the parties, they afford very important evidence in support of the Allegation that a marriage had been contracted between them, and laying out of consideration the acknowledgment to which there is the signature of " J. Gordon," if the previous declaration and signature is of the hand-writing of Mr. Dalrymple, it is evidence against him of a very high nature that he had contracted a marriage with Miss Gordon. But the Deponent does not consider that the Paper-Writing, No. 2, though of the hand-writing of the parties, amounts to or constitutes a marriage. It is only evidence to prove the fact that a marriage had been contracted between the parties: It is not conclusive evidence, but only such as must be weighed along with the other circumstances of the case, and it will have more or less effect according to these circumstances. The Paper-writing, No. 10, contains a declaration subscribed " J. W. H. Dalrymple" that Johanna Gordon is his lawful wife, and that he shall acknowledge her as such the moment he has it in his power ; and on the other hand a promise by " J. Gordon now J. Dalrymple" that nothing but the greatest necessity shall force her to declare this marriage. This Paper is also subscribed " Charlotte Gordon, witness." It imports little more than the Paper-Writing, No. 2 ; if the first part of it is written and subscribed by Mr. Dalrymple, it is important evidence against him to prove the fact that a marriage had been contracted between the parties, but the paper-writing does not amount to or constitute a marriage, it is only evi-

dence which will have more or less effect according to the circumstances of the case; and upon the whole the Deponent is of opinion that the Paper-Writings, No. 1, No. 2, No. 10, and No. 11, and the Letters annexed to the Libel, do not amount to or constitute a marriage by the law of Scotland, though if those parts of the writings bearing to be promises and declarations by Mr. Dalrymple are with the signatures, of his hand-writing, they are very important evidence against him to prove that a marriage had been contracted. The Deponent considers that in general such evidence is so strong, that it lays the *onus probandi* upon the party against whom is brought, who may still, notwithstanding such writings, be able to show from other facts and circumstances that no marriage was contracted. But ~~into order~~ to be aware of the full effect of these writings by the law of Scotland, it is necessary to take notice that if such a case were to be tried in Scotland, the Deponent is of opinion that the interest of the wife whom Mr. Dalrymple afterwards married in England according to the rules of the church, would be considered, and she would be made a party to the proceeding upon which the evidence adduced by Miss Gordon would be weighed, not only as to its effect against Mr. Dalrymple, but as to its effect against his wife, who would not be deprived of her *status* but upon evidence competent and sufficient against her; And the Deponent is of opinion that the paper-writings referred to would have had in the courts of Scotland a much greater effect against Mr. Dalrymple, if he had remained unmarried than they would have had in the question with him after his marriage in England. The Deponent holds this opinion upon the general principles of the law of Scotland, but he shall refer to two decided cases which tend to confirm it. In the case of Campbell against Cochrane which is reported in Falconer's Collection, 28th July, 1747, it was alleged that John Campbell of Carrick had made a private marriage with Magdalen Cochrane, and had afterwards married another lady; after his death Magdalen Cochrane claimed the character of his widow, but as she had connived at the second marriage, the Court of Session

would not allow her to prove her allegations. Falconer's Report goes no further, but it appears from appeal cases upon which the House of Lords gave judgment, 31st January 1753, that the decision of the Court of Session had been reversed of consent in the House of Lords, and Magdalen Cochrane was accordingly allowed to prove her case. The cause was decided against her upon the proof, and the judgment was affirmed in the House of Lords, as appears from a copy of the judgment which the Deponent has seen upon one of these appeal cases. In the Deponent's opinion, the evidence for Magdalen Cochrane would have been sufficient against Campbell the husband, but it was not sustained against the Lady whom he married publicly after having made what was said to have been his first marriage. And in another case, Napier against Napier, not reported, which was decided by the Court of Session about the year 1802, in which case the Deponent was employed as counsel, there was evidence, which, in the Deponent's opinion, would have been sufficient to prove a first marriage against the man, but which however was not sustained against his family by a second wife. The man was a native of Scotland, and as the Deponent believes, of Glasgow; he enlisted as a soldier at an early period of life, the first woman followed him, and it appeared from the evidence that she had lived with him as his wife along with the regiment. In the present case the Deponent is of opinion that the writings referred to, supposing that they would have been sufficient evidence against Mr. Dalrymple, if he had remained unmarried, to prove that he had contracted a marriage with Miss Gordon, would not have been sufficient evidence in a question with Mr. Dalrymple's wife, as a party in the proceeding, which would have taken place if the question had been tried in Scotland, to prove that a marriage had been previously contracted with Miss Gordon, so that according to the Deponent's opinion of the law of Scotland, the second marriage is a most important circumstance in considering the evidence of the first marriage. But the Deponent is further of opinion that the letters and

writings lose a great deal of their weight from another circumstance, that though the import of the writings is that the parties were married, yet the fact appears to have been that no marriage ceremony was performed either in the face of the church, or privately between the parties. But the Deponent is of opinion that according to the law of Scotland something more is necessary to the constitution of a marriage than mere declarations in writing that the parties are married; and though such writings may afford strong evidence that a marriage was contracted, they are not sufficient *per se* to constitute a marriage. If the parties trusted entirely to these writings, not merely for the evidence but for the formation or constitution of their marriage, the Deponent is of opinion that they did not do that which was necessary by the law of Scotland to constitute a marriage, and though they had consented to marry they did not thereby become married persons, but only formed a contract from which either party was at liberty to resile or draw back as in the case of imperfect obligations. The Deponent holds this opinion upon the general principles of the law of Scotland which have been applied in various decided cases, and more particularly in the case of M'Lauchlane against Dobson, 6th December, 1796, reported in the Faculty Collection, a decision which the Deponent has always regarded as of the highest authority. The Deponent strongly rests upon the opinion delivered by the Lord Justice Clerk M'Queen upon that case. He believes it to be universally acknowledged by the profession that the opinions of that judge are of as much weight in questions of law as the opinions of any other judge or lawyer that has appeared in Scotland. The Deponent has seen the notes of his opinion in the hand-writing of the Honourable Henry Erskine, formerly Lord Advocate of Scotland, who was a counsel in the cause, and which are in these words:—
 “ The case of M'Lauchlane against Dobson new, but the
 “ law is old and settled; two facts admitted *hinc inde*, no
 “ celebration, no *concubitus*, nor promise of marriage, fol-
 “ lowed by copula, Contract as to land not binding till

“regularly executed, unless where *res non sunt integræ*, a
 “promise without *copula*, *locus penitentiae*, even verbal
 “consent *de præsenti* admits *penitentiae*. Form of contracts
 “contains express obligation to celebrate, till that done
 “either party may resile. Private consent is not the *con-*
 “*sensus* the law looks to. It must be before a priest, or
 “something equivalent, they must take the oath of God to take
 “each other; a present consent not followed with any thing
 “may be mutually given up, but if so, it cannot be a
 “marriage.” Further the Deponent is of opinion that be-
 tween a man and woman domiciled in Scotland such pro-
 mises, acknowledgments or declarations as are contained in
 the paper-writings and letters in this question, would not
 amount to or constitute a marriage, though the Paper-
 Writing marked No. 10 had been signed in the presence
 of a witness competent by the law of Scotland to attest and
 prove the same, but that such writing would only be evi-
 dence of more or less weight according to circumstances,
 that a marriage had been contracted: And further, the
 Deponent is of opinion that if the promises acknowledgments
 and declarations contained in the paper-writings and letters
 already referred to, do not amount to or constitute a mar-
 riage, or do not as evidence, along with the other evidence
 to be had in the case, prove that a marriage had been con-
 tracted between the parties, they cannot amount to more
 on the part of the man than an obligation to solemnize a
 marriage in the face of the church at some future time,
 provided he should be duly called upon by the woman so to
 do, and there should be no legal impediment to the mar-
 riage. Deposits that the most obvious view of these writings
 is, that they contain admissions express or implied in point
 of fact that the parties were actually married, and such ad-
 missions in the hand-writing of Mr. Dalrymple are evidence
 against him stronger or weaker according to the circum-
 stances of the case, that the fact so admitted was consistent
 with the truth; But that the Paper-Writings, No. 2 and
 No. 10, may be considered as having been intended to make
 and constitute a marriage *de præsenti*, and if these writings

are sufficient evidence that such was the concurring intention of the parties when they were delivered, a question in law arises in which the Deponent has reason to believe that different and opposite opinions are entertained by Scottish lawyers. It is commonly stated as a general rule of law, that marriage may be constituted by consent alone, and in arguments upon this subject it is commonly said, that *consensus non concubitus facit matrimonium*. The Deponent is of opinion, that in the application of these rules it must be understood that the consent intended by them means a consent to some *habilis modus* of constituting a marriage, which leaves the question behind, whether that which parties have consented to was a *habilis modus* or not. The Deponent is of opinion that the writing and delivering of the paper-writings in this case was not *per se habilis modus* of constituting marriage, and would not have had the effect of making a marriage between the parties, even though the writings were to be considered as evidence that the parties had intended them for the purpose of constituting a marriage. But the Deponent believes that an opposite opinion is entertained by some lawyers who hold that as a marriage may be constituted by consent alone, any intelligible form of expressing consent will make a marriage. This opinion seems to have had much influence with the court in the case of Walker against M^cAdam, 4th March, 1807, reported in the Faculty Collection. In that case the man declared the woman to be his wife before several witnesses, for the purpose as it appears of constituting a marriage *de præsenti*; in the course of the same day he shot himself with a pistol, so that the marriage was left *in nudis finibus contractus*, no copula or cohabitation having followed it; This however was sustained as a marriage by the court; The decision has since been appealed from to the House of Lords, and in the Deponent's opinion it was erroneous in law, in so far as the declaration before witnesses was sustained *rebus integris* as the constitution of a marriage. The Lord President Sir Hay Campbell, whose opinion as a lawyer is of the greatest authority, was against the decision, and the appeal remains

yet undetermined. The Deponent is further of opinion, that if the paper-writings now in question are not considered as evidence that it was the concurring intention of the parties at the time to make and constitute a marriage *de præsenti* by means of these writings, there can be no doubt that they do not constitute a marriage, for the consent necessary to the constitution of a marriage must be consent to a marriage *de præsenti* by both parties at the same time ; If marriage is not completed at the moment, there is no marriage constituted by the supposed act of consent ; Thus if a man were to write such declarations as those referred to, and were to send them to a woman in a post letter, this would not constitute a marriage, though it would afford evidence that a marriage had antecedently been constituted. The Deponent thinks it is very clear that the writings created an obligation upon Mr. Dalrymple to marry Miss Gordon, but the question is, whether they did nothing more. The Deponent is of opinion, that the words before the signature of J. Dalrymple in the Paper-Writing, No. 2, are in sufficient form to express consent *de præsenti* to marriage, and so are the words before the signature of J. W. H. Dalrymple in the Paper-Writing, No. 10, and that in so far there was a *habilis modus* of contracting a marriage. But though the words may be sufficient, the act of marriage may not be completed ; If the act of consent necessary to marriage is only inchoated or begun without being completed, there is no marriage ; And the Deponent is of opinion that the most direct expression of consent is not sufficient to make a marriage, unless the parties either go through the marriage ceremony, or, after expressing their consent, complete the marriage by consummation : And further, that supposing a marriage could be constituted without either ceremony or consummation, and by mere verbal expressions of consent, yet if the words are not used *eo intuitu* of making and constituting a marriage *de præsenti*, they are ineffectual, and the same is the case if the other party does not join in expressing the consent to marriage *de præsenti*. The consent on both sides ought to

be unequivocally expressed and at the same time; and it seems to be necessary that it shall create a belief in both parties that they are actually married, and that no further ceremony is necessary to unite them; for though their mutual professions should be very strong, they may still think that something more is necessary to constitute a marriage, as in the case of a man and woman who propose to marry, and previous to the ceremony sign their marriage settlements, which, in Scotland, usually contain words whereby the parties *per verba de presenti* accept of one another as man and wife; the words are as strong as those employed by the parties in this case, and yet they do not consider themselves to be married. They have only signed their contract of marriage which is no more than an obligation, and both parties have it in their power to retract. The common clause in contracts of marriage to which the Depo-
nent has alluded is in such words as the following, “the
“ said parties have accepted and do hereby accept of each
“ other for lawful spouses, and they promise to solemnize
“ the bond of marriage with all convenient speed, according
“ to the rules of the church.” The writing with this clause
in it, though executed with great formality in the presence
of witnesses, and very frequently in the presence of a num-
ber of their nearest relations, never was held to constitute a
marriage; the intent is only to create an obligation, and the
writing has no further effect: For the same reason the
writings in this case may have no other effect than that of
creating an obligation to marry, though they are obviously
very different from common contracts of marriage, in ex-
ecuting which the parties never suppose that they are con-
stituting a marriage.

8. To the eighth article of the said Allegation he deposes and says, That in his opinion, supposing a marriage had not been contracted by the parties, and that Mr. Dalrymple had only come under an obligation to marry Miss Gordon, such obligation must necessarily have been defeated by his subsequent marriage, and could not operate so as to void the subsequent marriage. But on the other hand, supposing a

marriage had been contracted between Mr. Dalrymple and Miss Gordon, no omission or neglect on her part would void such previous marriage, and the subsequent marriage would be void and null.

9. And to the ninth article of the said Allegation he deposes and says, that in his opinion, if the writings are of the hand-writing of Mr. Dalrymple, they are probative without the attestation of witnesses : if they are not of his hand-writing, but are subscribed by him, and this is admitted or proved, their effect may be doubtful ; but the Deponent is of opinion that even in that case they would be probative as declarations or acknowledgments of a fact ; for example, that the parties had been married, but they would not be probative as contracts or obligations, and the Deponent is of opinion that they would not be probative as agreements to marry *de præsenti*. Further the Deponent is of opinion, that the natural and lawful sister of the woman party may not be received as a witness in her behalf to prove contracts, acknowledgments, or agreements of the nature of the aforesaid Paper-Writings, as it was decided in the case of Dalziel against Richmond, 10th July, 1790, reported in the Faculty Collection, that the sister of a person in a declarator of marriage was inadmissible as a witness for her, and though some older authorities are against that decision, the point thereby decided is now considered as established law. Further, the Deponent is of opinion that by the laws of Scotland women are not habile witnesses to written instruments, and he is of opinion that the attestation of Charlotte Gordon adds nothing to the authenticity of the Paper-Writing, No. 10.

JOHN CLERK.

HARRY DAVIDSON, Not. Pub. and Actuary assumed.

And the same Witness being examined on the Interrogatories given on behalf of Johanna Dalrymple, the other Party in this Cause.

1. To the first of these Interrogatories this Respondent deposes and answereth, That in the case put the marriage would be effectual by the law of Scotland.

2. To the second Interrogatory the Respondent deposes and answereth, That the question whether marriage may be constituted between parties in Scotland by promise and subsequent copula, was decided in the affirmative in the case of Pennycook against Grinton and Graite, 15 Dec. 1752, reported in the Faculty Collection, in reference to which case it is said by Lord Kaimes, in his Elucidations respecting the law of Scotland, article 5, p. 39, that the judges were almost unanimous that a promise *cum copulâ*, makes a complete marriage; and Mr. Erskine in his Institutes, B. 1. Tit. vi. §. 4, lays down the doctrine in the strongest terms, that a copula subsequent to a promise of marriage constitutes marriage by the law of Scotland. But the Respondent is of opinion that there are very weighty objections against the doctrine, some of which are stated by Lord Kaimes, in the article of the Elucidations before-mentioned; and the Respondent is of opinion that the doctrine was not allowed in the practice of the Scotch courts till the before-mentioned case of Pennycook. Further, if a case of the same nature were to occur now in Scotland, in which there had been a promise of marriage followed by a copula, and the woman had taken no legal measures to have the marriage declared, till after a second marriage in *facie ecclesiæ* between the man and another woman, the Respondent thinks it not altogether clear that the Scotch courts would annul such second marriage, though he is of opinion that they would annul it, but he should in such a case advise an appeal to the House of Lords against the judgment, with considerable expectations of success upon what he considers to be the true principles of the law of Scotland: And the Respondent further deposes and answereth, that the question whether marriage may be consti-

tuted between parties in Scotland by solemn, verbal or written declaration of consent *de præsenti*, with equal effect in point of validity as it may by a celebration in *facie ecclesiæ* is not precisely settled by authorities and decisions; and the Respondent has already given his opinion upon this subject in his deposition in chief, and the Respondent has also given his opinion as to the effect of the legal domicile or place of residence of the parties in question as to the constitution of marriage within Scotland.

3. To the third Interrogatory, the Respondent deposes and answereth, That the marriages celebrated at Gretna Green, and other places in Scotland, between persons domiciled in England and recently arrived from that country, have generally been considered as effectual marriages by the law of Scotland; though the Respondent has frequently heard doubts expressed with regard to their validity. But this he considers to be a question rather in the law of England than in the law of Scotland, where the parties continue their domicile in England immediately after their marriage. If the parties were to reside in Scotland after their Gretna Green marriage, the case would resolve into that of a common irregular marriage. In the case of Wyche against Blount, 27th June 1801, it was substantially found that a Gretna Green marriage between English parties who had returned to England immediately after the celebration was effectual.

4. To the fourth Interrogatory the Respondent deposes and answereth in the negative.

5. To the fifth Interrogatory the Respondent deposes and answereth in the affirmative as to the effect of a regular marriage celebrated in the face of the Scottish church; and as to the remainder of the Interrogatory the Respondent deposes and answers that he refers to his opinion already given. And further deposes and answereth, that in his opinion, a Scottish woman and an English officer quartered with his regiment in Scotland, contracting an irregular marriage, are subject to the same laws that apply to the domiciled inhabitants.

6. To the sixth Interrogatory the Respondent deposes and answereth, That supposing a promise or obligation to marry

followed by a copula, does, according to the law of Scotland, constitute a marriage, he knows of no case in which the parties are absolutely bound to fulfil an obligation to marry. But on that supposition they may in all cases resile from such obligation, being liable only to a claim of damages for breach of engagement. But if on the other hand a promise or obligation to marry, followed by a copula, does not constitute a complete marriage, the Respondent is of opinion that in such a case, the parties, at least the man could not resile from the obligation, although the effect of such obligation might be defeated by another marriage as a mid-impediment.

7. To the seventh Interrogatory the Respondent deposes and answereth, That Lord Stair's Institutes is a work of very high authority in the law of Scotland, though some of the opinions contained in it are erroneous: and as to the doctrine laid down B. 1. Tit. iv. §. 6, referred to in the Interrogatory, the Respondent deposes and answers, that he holds it to be correct under the limitations which will appear from former parts of his deposition, and that it has been recognized as the existing law of Scotland in some cases, apparently without limitation, but in other cases under limitations which appear to confirm the opinions which the Respondent has already given upon this subject.

8. To the eighth Interrogatory the Respondent deposes and answereth, That Erskine's Institutes is one of the latest institutional works of authority on the law of Scotland, though some of the opinions contained in it are erroneous; and as to the doctrine therein laid down, B. 1. Tit. vi. §. 5, the Respondent is of opinion that it is not recognized as the undoubted existing law of Scotland; that in the last edition which the Respondent has seen of Erskine's Institutes, published in 1805, there is a note which seems to the Respondent to refer to the doctrine in these words, "From the later decisions of the court there is reason to doubt if it can now be held as law that the private declarations of parties even in writing are *per se* equivalent to actual celebration of marriage." And the Respondent does for himself consider the doctrine to be incorrect, and he refers to former parts of his deposition for his opinions with respect to it.

9. To the ninth Interrogatory the Respondent deposes and answereth, That in his opinion the doctrine was recognized and allowed by the decision of the Court of Session, in the case of Taylor against Kello, 16th February, 1786, but that decision was reversed in the House of Lords, and though the reversal was upon special grounds, for which the Respondent refers to the terms of the judgment, he does not consider that the doctrine was thereby recognized : Further deposes and answereth, that in his opinion the doctrine was not recognized by the decision of the Court of Session in the case of Inglis against Robertson, 3 March, 1786, as it appears to the Respondent, though the report in the Faculty Collection wants precision, that it was a case of long intercourse during which the parties had carnal communication, and it is said that the Defender in his defence did not deny *concubitus* ; and upon the whole the Respondent thinks that the decision does not apply to the doctrine of Mr. Erskine, cited in the eighth Interrogatory : Further deposes and answereth, that his information with respect to the case Callender against Boyd, decided in 1801, but which does not appear to have been reported, is so slight that he does not think himself entitled to give any opinion upon that decision as an authority : Further deposes and answereth, that the decision in the case of Edmondstone against Cochrane, 15th May, 1804, does not recognize the doctrine, as that was a case in which a copula followed the obligation to marry or declaration of marriage, and though it is stated in the report that the Court in general held that a written acknowledgment *de præsenti* was sufficient to constitute marriage, and the Interlocutor of the Lord Ordinary which the Court adhered to, apparently rests upon the consent of parties to constitute a marriage *de præsenti* without referring to the copula ; yet the Respondent without other information respecting the case than what is contained in the report, cannot suppose that the Court overlooked the very material circumstance of the copula, which would have been sufficient with a bare promise to bind the man to marriage, even although it were to be supposed that a declaration of marriage *de præsenti* did not constitute a complete

marriage, or that a promise of marriage with a subsequent copula did not constitute a complete marriage; but in either case that the obligation was by the subsequent copula rendered so binding as that the man could not resile from it, though if there had been a *medium impedimentum* it might have been defeated: But upon the evidence of the report the Respondent is of opinion that it is at least highly probable that some such general doctrine as that laid down by Mr. Erskine in the eighth Interrogatory was on that occasion laid down by the judges.

10. To the tenth Interrogatory the Respondent deposes and answereth, That as to the effect of solemn written declarations of consent *de presenti* to marriage, he refers to what he has already deposed to; and as to the reversal of the judgment in Taylor against Kello, by the House of Lords, he is at a loss to find any general declaration of law expressed or implied in the judgment, further than what may be implied in its being found that mutual express declarations and acknowledgments of marriage in writing were ineffectual to constitute a marriage, in the circumstances of that case wherein it appeared to the House of Lords that the parties did not intend or understand the writings as a final agreement, nor was it so intended or understood that they had thereby contracted the state of matrimony, or the relation of husband and wife from the date thereof. The facts stated in the report of the case in the Faculty Collection, and in the Appeal Cases which were before the House of Lords, leave it uncertain what will be sufficient in the circumstances of a case as a ground for finding that the most direct and unequivocal declaration of marriage in writing was not a final agreement, nor so intended, or understood that the parties had thereby contracted the state of matrimony or the relation of husband and wife from the date thereof; But the Respondent is of opinion that unless it had been held in that case by the House of Lords that the mutual declarations of marriage were not sufficient to prove the constitution of a marriage without consummation, or without something further done by the parties in pursuance of the agreement thereby declared, the judgment would not

be consistent with any hypothesis he is acquainted with as to the law of Scotland with respect to marriage, and this opinion he has formed upon considering the facts of that case as they are stated in the report of the Faculty Collection and in the Appeal Cases.

11. To the eleventh Interrogatory the Respondent deposes and answereth, That he refers to the former parts of his deposition upon the subject of the Interrogatory.

12. To the twelfth Interrogatory the Respondent deposes and answereth, that he is of opinion that it was decided in the case of M'Adam against M'Adam, 4th March 1807, that a verbal declaration of marriage made before witnesses, was sufficient to constitute a marriage, but the Deponent never heard of any other case, in which, according to his opinion, it was decided that a bare declaration of marriage without the ceremony of marriage performed by a clergyman, or by some person taking upon him the functions of a clergyman, was while matters remained entire and in *nudis finibus contractus* sufficient to constitute a marriage; and the Respondent refers to what he has already deposed with respect to the case of M'Adam against M'Adam: And further deposes and answereth, that in his opinion the various writings annexed to the Libel in the present case, though they contain in words, sufficiently full and explicit declarations of consent *de presenti* to marriage, and declarations as full and explicit as in the case of M'Adam; yet he is of opinion that in the case of M'Adam the declaration of marriage was attended with an apparent intention of immediate publication of the contract and acknowledgments to the world by the man or the woman as his wife, which, on the supposition that marriage may be perfected by mere consent, expressed by the parties, makes that a stronger case than the present, in which the expression of mere consent given by the parties was not attended with such acts, showing that it was their immediate intention to contract the state of matrimony.

13. To the thirteenth Interrogatory the Respondent deposes and answereth, That written declarations of marriage have not, so far as he knows, been enumerated by lawyers

among the writings to which the solemnities of formal deeds are necessarily required by the law of Scotland, and the Respondent refers to a former part of his deposition upon this subject; and the Respondent further deposes and answereth, that he does not recollect of any case in which a writing was sustained as proof that a marriage had been contracted between the parties, where such writing would not have been probative according to the law of Scotland, in the case of any other contract or obligation.

14. To the fourteenth Interrogatory this Respondent deposes and answereth, That in a question of personal obligation the want of the solemnities required by law is of no consequence where the party judicially admitted that he wrote, signed, and delivered the writing, but where the party only signed the writing, and did not write it with his own hand, it is void and null without the solemnities where matters are entire and in *nudis finibus contractus*. The Respondent does not know that the point has occurred in a question of marriage where matters are not entire, but where some consideration has been given or something has been done by the obligee upon the faith of the deed, whereby his condition is rendered worse: the party who has signed the deed is bound by it, though it want the solemnities, and though he did not write the deed.

15, 16. To the fifteenth and sixteenth Interrogatories this Respondent deposes and answereth, 'That he refers to former parts of his deposition upon these subjects.

17. To the seventeenth Interrogatory the Respondent deposes and answereth, That the decision in the case of Pennycook against Grinton, 15th December, 1752, determined that under the circumstances of that case the second marriage was null and void, and the Respondent is of opinion that this ought to be considered as a decision, that a promise of marriage with a subsequent copula does constitute a marriage to the effect of voiding any after marriage. And although Lord Kaimes seems to think that the irregularity of the second marriage in that case, so far as it proceeded without proclamation of banns had weight with the judges; and seems to think that in a case where the banns of the second

marriage have been regularly proclaimed, the second marriage would not be voided on the ground of a former connection in which there had been a promise of marriage *cum copulâ*. The Respondent is of opinion that there is no material distinction between the two cases, for the second was a valid marriage without proclamation of banns, and if so it could not be voided but by a previous marriage; and if there was a previous marriage the second must have been voided whether it was regular or not. And the Respondent refers to a former part of his deposition in regard to the case of Pennycook against Grinton, and with regard to the effect of a promise of marriage when followed by a copula. And the Respondent further deposes and answereth, that excepting in the case of Pennycook against Grinton, he does not know that the question ever was decided whether a promise of marriage given by a man to one woman and a subsequent copula with her, was sufficient to void an after marriage betwixt him and another woman. But the Respondent finds in Kilkerran's decisions or reports, which is a book of authority, p. 488, a reference to two cases from which it appears to the Respondent, that according to the opinion of the author, and according to the opinions which prevailed when those cases occurred, a promise of marriage with a subsequent copula did not constitute a marriage: Kilkerran's report in which the reference is made is of the case of Linning against Hamilton, decided 1st December, 1749: This was an action of damages at the instance of a woman against a man for seduction or *stuprum fraudulentum*: The author says "It was admitted that action might nevertheless lie *ex dolo*, had any fraud or deceit been used, and which was said to be the case in the only two decisions that are to be found upon record on this point, viz. Ker contra Hyslop, in 1696, and Castlelaw contra Agnew of Shenchán, as in both there was a promise of marriage; though in Ker's case Hyslop the man had in the interim married another, and so could not be decerned to adhere; and in Castlelaw's case the adherence was not insisted on by her, and Shenchán was rather willing to pay the £200 sterling, which the Commis-

saries had decreed, and so the adherence which is the proper decerniture or promises of marriage and subsequent copula, was in effect passed from by consent of parties." The case of Ker against Hyslop is reported by Fountainhall, Vol. I. p. 728, and appears to have been decided on 15th July 1696; But the Respondent has obtained no further information respecting the case of Agnew.

JOHN CLERK.

HARRY DAVIDSON, Not. Pub. and Actuary.

And the same Witness being examined upon the additional Interrogatories for the said Johanna Dalrymple.

1. To the first of these additional Interrogatories the Respondent deposes and answereth, That he is of counsel for the Defendant Mr. Dalrymple in this Cause, and has been professionally employed by him in conducting his defence, and that according to the best of his recollection since its first commencement.

2. To the second additional Interrogatory the Respondent deposes and answereth, That he gave his advice and assistance in preparing and framing the cross Interrogatories on which the witnesses produced for the Plaintiff were examined in summer and autumn 1809, and, according to the best of his recollection, he prepared some part of these Interrogatories, though he did not finally adjust or prepare them in whole.

3. To the third additional Interrogatory the Respondent deposes and answers in the affirmative.

4. To the fourth additional Interrogatory the Respondent deposes and answers, That he did advise the plea that the Plaintiff's suit is barred by the Defendant's subsequent

marriage with Miss Manners, and that he suggested that plea, though he does not recollect whether he was the first or only person that suggested it or not; and that he does not recollect whether he took it for granted that the Plaintiff was in the perfect knowledge that the Defendant had returned to Britain, and of his courtship of and intended marriage with Miss Manners, and rather thinks he did not take these circumstances for granted, or that they were much in his contemplation.

5. To the fifth additional Interrogatory this Respondent deposes and answers, That supposing the Plaintiff neither knew of the Defendant's return to Britain, but was induced to believe he was abroad, nor of his intended marriage with Miss Manners until it had actually taken place, his opinion as to the present suit being barred by the subsequent marriage would be the same, that it is on the supposition that the Plaintiff was acquainted with these circumstances.

JOHN CLERK.

24th Nov. 1810.

Repeated and acknowledged at Edinburgh, before me the undersigned
Wm. CALDER, Provost.

In presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the ALLEGATION and EXHIBITS given on behalf
of Mr. DALRYMPLE.

13th November, 1810.

DAVID CATHCART, Esq. of the city of Edinburgh
Advocate, aged forty-six years, a Witness produced
and sworn.

DEPOSES, That he has practised as an Advocate before the Court of Session in Scotland, since the year 1785, and to the seventh article of the said Allegation, the Deponent having attentively and deliberately perused and considered the several articles of the said Allegation with the Exhibits annexed thereto, and also the libel given in the said cause on the part of Johanna Dalrymple, the promoter, and the original exhibits marked No. 1, 2, 10 and 11, and the several original letters annexed to the said libel, he deposes and says, that he conceives a person domiciled in England does not become domiciled in Scotland who comes there without any will of his own, in consequence of orders with a marching regiment, and merely remains there with his regiment. As to succession the Deponent holds it clear that his domicile was not changed, although from his accidental residence his conduct must be subject to, and regulated by the law of Scotland while he resides there. The Deponent can entertain no doubt that such a person could lawfully contract a marriage according to the law of Scotland, but he thinks that in establishing a private marriage, the courts here in such a case would require much stronger evidence than might be sufficient to establish a marriage betwixt natives of this country, and he conceives that it would enter deeply into the consideration of the courts of this country in determining a question of this kind, that the young man

who granted the writings founded on, was not domiciled in this country, was a minor, incapable of entering into such a contract in England where he was domiciled, and they would attentively consider whether the words or expressions from which his consent to marriage was inferred, were of that nature and form, so as to leave no possibility of doubt as to his solemn intention to contract marriage, especially if matters remained entire : The Deponent is of opinion, that between a man and a woman domiciled in Scotland, according to the law of Scotland, such persons never having had carnal copulation together, upon the faith of, or subsequent to any promise, acknowledgment or declaration of marriage, and they never having lived or cohabited together as husband and wife, or been reputed as such, by their relations, neighbours or acquaintances and others, such pretended promise acknowledgment or declaration as are contained in the writings marked No. 1, 2, 10 and 11, and the letters annexed to the libel, although the same had been preceded by a carnal copulation, do not amount to or constitute a valid or effectual marriage legally binding on either of the said parties, and matters being entire, he apprehends it was in the power of either of them to resile. The Deponent will explain what he understands to be the law of Scotland with regard to marriage. By our ancient law, and by the canons of the church of Scotland, vide Canons of the Church of Scotland in 1242, published by Lord Hailes, celebration of marriage in *facie ecclesiæ* was indispensable. This unquestionably continued to be the law of Scotland till the reformation, when marriage continued to be celebrated by clergymen who had been deprived of their functions. The difficulty of proving solemnization at a great distance of time, gave rise to the Statute 1503, ch. 77, which introduced a presumption that if the marriage had not been objected to in the life-time of the man, it should be sufficient to obtain possession of the terce that the woman was habit and repute the man's lawful wife during his life time. "By and while it be clearly discerned and sentence given that she was not his lawful wife." It is clear, therefore, that cohabitation as man and wife, was

not held as sufficient to constitute marriage, it was only held to afford a presumption that a marriage had been solemnized between the parties, unless the contrary had been proved, vide Sir George Mackenzie's observations, p. 114.

In the same way, the Act 1551, ch. 19, Anent Bigamy, demonstrates, that a marriage could only be constituted by celebration in *facie ecclesie*. The law therefore, had no idea of any other marriage, and Sir George Mackenzie remarks, marriage is contracted with us, *per hieralogium*, or *benedictionem ecclesie et ante coitum*. In the same way after the reformation, although marriage was no longer a sacrament, yet celebration by a Minister after the proclamation of banns was held to be essentially requisite: This is established by the first book of discipline in 1560, (vide Archbishop Spottiswood's Church History, B. I. p. 172), by the directory of worship, in 1643, by the Acts 6 and 7 of Assembly 1690, and Act 15 of Assembly 1715, in short the whole of our Statutes not only hold the solemnization of a marriage by a Clergyman as necessary, but punish with severity Clergymen not authorised by the church as then established, who should attempt to celebrate marriage. By the Statute 1641, ch. 8, revised by Statute 1661, ch. 34, it was enacted that whoever shall marry in a clandestine way or procure themselves to be married by Jesuits, Priests, or any others, not authorised by the kirk, shall be imprisoned for three months and shall pay very high fines, and that the celebrator of such marriage shall be banished the kingdom never to return therein, under the pain of death.

At the time these Statutes passed, no idea had ever been entertained that persons declaring their consent to marry *de presenti*, was as effectual a marriage as could be celebrated by a Clergyman, without any thing whatever having followed upon it; such a declaration might afterwards produce that effect by consummation and cohabitation as man and wife, either in virtue of the Statute 1503, which secured her terce to the widow, who had cohabited with and lived with her husband as his wife, without their marriage being challenged during his life, or from matters not being entire, the one

party might have a claim upon the other to solemnize marriage, and which might be enforced by the Commissary Court according to a case stated by Craig, Lib. ii. Dieg. 18 and 29; by the Statute 1698, ch. 6, it was enacted that persons clandestinely or irregularly married, contrary to the Act 1661, shall be obliged to declare the name of the person who celebrated the same, and of the witnesses, under a very heavy penalty and imprisonment, and the celebrator is declared to be liable to be summarily seized, and to be punished by perpetual banishment, and such pecunial or corporal pains as the privy council should think fit. These Statutes therefore appear altogether absurd, if celebration by a clergyman, or by some one assuming the functions of that office had not been conceived necessary to constitute marriage by the law of Scotland; and the Deponent is not acquainted with a single instance in which it has been ultimately decided, in Scotland, that the bare declaration of parties without celebration *rebus integris* ever had the effect of constituting marriage, unless the case of M'Adam against M'Adam, (14th March, 1807,) in which a great difference of opinion prevailed in the Court of Session, shall be held as of this description, but that case is not yet finally decided, being under appeal, and is totally different from this, as there Mr. M'Adam having lived with a woman by whom he had two children, summoned all his servants, and taking her by the hand in their presence, declared her his lawful wife, and the children his lawful children, and to which the lady seemed to assent, and was congratulated upon the marriage by many persons, and in the course of the same day Mr. M'Adam shot himself. Here there was a public declaration of marriage *de præsenti* before a number of witnesses, which rendered it public and notorious, and he had never resiled from that declaration of marriage; whereas, in the present case, according to the statement given, the writings founded on were altogether latent and known to no person but themselves, and were solely in the custody of the lady. The Deponent apprehends that many cases have occurred in Scotland where the acknowledgments or declarations of

marriage by the parties were stronger than those made use of in this case, and where, from their having been no cohabitation afterwards as man and wife, these declarations in words *de præsenti* were not held sufficient to constitute marriage, that is to say, that until cohabitation had barred the power of resiling, each of the parties might resile. In the case of M'Lauchlane against Dobson, (6th Dec. 1796, Supplement to Dictionary) a long correspondence by letters, in which the parties stiled each other husband and wife, followed by a verbal declaration of marriage before witnesses was held insufficient to constitute a marriage where there was no consummation, for although in this country there are no precise forms which are indispensable in the solemnization of marriage yet *rebus integris* it can only be constituted by a consent adhibited in the presence of a clergyman, or in some other solemn mode equivalent to actual celebration. In that case at least thirty letters had been written by Dobson to the lady, addressed to her as his wife, and subscribed her affectionate husband, and he had even written letters to her mother and sister, addressed to the first in the character of his mother-in-law, and the latter his sister; the lady had in the same manner subscribed herself his affectionate wife, and even by the name of Helena Dobson, and at a meeting of her relations, Dobson did there public acknowledge and declare Helena M'Lauchlane to be his married wife, and she on her part declared him her lawful husband, although the commissaries in an action at the instance of the lady against Dobson, declared the marriage, yet the Court of Session altered that judgment. In that case it was expressly laid down by Lord Justice Clerk M'Queen, (certainly one of the highest authorities upon the law of Scotland) "that consent *de præsenti* admits penitentiæ; private consent is not the consent the law alludes to, it must be before a priest or something equivalent, they must take the oath of God to each other, a present consent not followed with any thing may be given up, but if so, it cannot be a marriage." And this reasoning had great weight with the bench. In the case of M'Innes against

More, the declaration of marriage, which was by a holograph writing in words *de præsenti*, (20th Dec. 1781,) was found not to be sufficient to constitute marriage. The decree of the House of Lords declared, "that the written acknowledgment is not sufficient proof of any marriage having passed betwixt the pursuer and defender." In that case, a consent or declaration of marriage *de præsenti*, was established, but this was not found sufficient to prevent More from resiling, as matters were entire from that period, no cohabitation having taken place. In the case of Taylor against Kello, (16th February, 1786,) the parties had interchanged and delivered to each other mutual missives in the following terms. "I hereby solemnly declare you Patrïck Taylor, in Birkenshaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." There was thus the most complete legal evidence of mutual declarations of marriage *de præsenti*. The Commissaries found this to be a marriage; the Court of Session confirmed the judgment, but it was afterwards reversed upon appeal: no doubt different cases might be mentioned where similar writings have been held sufficient to constitute a marriage, but then in all these cases consummation or cohabitation as man and wife had followed. Thus in the case of M'Kie against Ferguson, 1782, both parties in the presence of witnesses, declared before God and man, that they took each other for man and wife, and they accordingly undressed and went to bed, where they remained *nudus cum nudâ*, with the door locked for a considerable time; the Commissaries 4th Jan. 1780, "found facts, circumstances and qualifications proven, sufficient to infer a marriage betwixt the parties," and this judgment was confirmed. In the same way in the case of Cochrane against Edmonstone, (1802,) although there was a private declaration of marriage in words *de præsenti*, yet this was also followed by consummation, as Edmonstone admitted that he slept with the lady the night after he had given her the letter, and their cohabitation as man and wife continued for some time afterwards. Further all contracts of marriage which are subscribed in the most solemn and formal manner,

contain a consent *de præsenti*, the parties thereby, "accept
 "and take each other for lawful spouses," with an after declaration to solemnize the marriage in face of the church. Yet it has always been held, that these declarations of marriage made *de præsenti* do not constitute marriage, but that it is in the power of either of the parties to resile; and even when this solemn contract was fortified by penalties, it has been found that there was still a power of resiling, *rebus integris*, 25th Jan. 1715, Young against Irvine and Anderson. Although Lord Stair has not treated of this subject with his usual accuracy, yet the Deponent does not consider his Lordship's opinion as decidedly contrary to what he the Deponent has above ventured to state, for although Lord Stair, B. i. T. 4, seems to think that the public solemnization of marriage though enjoined by the law is not essential, and takes notice of the distinction betwixt public and private, or clandestine marriages; yet, when he comes to specify how a private or clandestine marriage is constituted, he refers to cohabitation, and being commonly reputed man and wife, which he observes, validates the marriage, and gives the wife right to her terce, by the Statute 1503, ch. 77, and he also refers to a contract of marriage found valid, though the marriage was never solemnized, and to a similar case in which the contract of marriage was found valid, and the man obliged to solemnize the marriage, seeing he had procreated children with the woman, and by his writings had acknowledged he had married her; All this seems to the Deponent to confirm the opinion that *rebus integris*, a contract or declaration of marriage may be resiled from; His Lordship has indeed said upon the authority of the canon law that *consensus non coitus facit matrimonium*; This is certainly true, it is not the *coitus* that makes the marriage, but the consent must be expressed in the regular way the law requires, by solemnization, and if it is not so expressed, the court must judge whether by facts and circumstances, the alledged consent has been carried into effect, and will not give it greater weight than the declaration of parties *de præsenti* in a regular contract of marriage that they accept

of each other as husband and wife, and that they will afterwards cohabit as married persons, or celebrate the marriage with their first conveniency : as to the writings No. 2, and 10, they are stated in the envelope to be sacred promises and engagements which demonstrates the opinion of the parties that further celebration was to take place, and in the writing No. 10, Mr. Dalrymple says "and as such, I shall acknowledge her the moment it is in my power," and Miss Gordon declares "that nothing but necessity shall ever force me to declare this marriage," which seems also to imply that something farther was to be done. And therefore, even according to this view, the Deponent conceives either party may have the power of resiling while matters are entire. But if parties have acted upon the faith of it by consummation or cohabitation, this as in every other agreement, must bar penitencia, and must of course render the consent of equal effect as if given in *facie ecclesiæ*. Mr. Erskine's doctrine is more unfavourable to the opinion the Deponent has formed. He has referred to no authority where the private consent of parties by words *de præsenti* has been found sufficient to constitute marriage by the mere emission of words or by a writing, either consummation or cohabitation having followed upon it. The Deponent has already said, that he can find no such case, and the three cases which have been decided since Mr. Erskine's Institute was written, viz. M'Lauchlane, M'Innes, and Taylor, in all of which the most express words *de præsenti* are made use of, seem to the Deponent to be sufficiently strong to shake the opinion of Mr. Erskine unsupported by any authority whatever. Besides about the very time that Mr. Erskine wrote his book, a most learned and able judge had formed a decidedly contrary opinion, which has been published in his elucidations respecting the law of Scotland, and which appears to the Deponent entitled to very great weight, vide Kaime's Elucidations, article 5. The Deponent apprehends that the consent or acknowledgment *de præsenti* may be proved by witnesses, or it may be proved by writing, and it will be equally effectual whether it be proved in the one way or the other ; If proved by

writing, it should be by a holograph writing, or by a writing attested before two unexceptionable witnesses. The Writing No. 10 is neither the better nor worse of "Charlotte Gordon witness," a woman cannot be an instrumentary witness, and on account of her being the sister of one of the parties she could not be examined on her part; vide 10th July, 1790, Dalziel against Richardson.

8. To the eighth article of the said Allegation, the Depo-
nent is humbly of opinion and says, That by the general
law usages and customs of Scotland, the Writings there men-
tioned and alluded to do not amount to more than an obliga-
tion to solemnize a marriage in the face of the church at
some future period, provided either party should be duly
called upon so to do, and there should be no legal impediment
to the said marriage; and if the woman shall afterwards
be aware, or have just grounds to presume that it is not the
intention of the man to proceed to the solemnization of the
marriage in pursuance thereof, and in particular shall have
knowledge or credible information that he is about to solemn-
ize marriage with another person, and thereupon shall omit
or neglect to call upon him to proceed to the solemnization
and completion of that marriage in pursuance of such obli-
gation, and to institute legal proceedings for giving effect
thereto, and the man shall accordingly without objection or
interruption in due and legal form solemnize marriage with
another person, then such obligation to marry as is contained
in the said papers or any of them, cannot operate to render
void the subsequent marriage so duly and lawfully solemn-
ized. If a legal marriage has taken place, then any poste-
rior marriage of one of the parties must be null. No doubt
in the case of Pennycook against Grinton, 15th December,
1752, it was found that a promise of marriage followed with a
copula makes a lawful marriage, and that an after-marriage of
one of the parties was void; Lord Kaimes has most justly
questioned the authority of this judgment, and seems to think it
must have had great weight with the court that proclamation
of banns had not taken place in the posterior marriage, his
-lordship certainly assigns the strongest reasons for ques-

tioning it, and the Deponent doubts much how far the court would now pronounce a similar judgment, especially when he considers two other cases which he thinks materially affect this question; the one is the case of Magdalen Cochrane against Campbell, 19th June, 1751, and affirmed in the House of Lords, 31st January 1753; and the other that of William Napier against Napiers, 12th June 1801. In both of these cases there was the strongest evidence of anterior marriages produced, such as the Deponent is quite satisfied must have established these marriages, had not other marriages taken place in which the rights of third parties were involved. The Court of Session in the first case, found that the pursuer by her acquiescence for many years was barred *personali exceptione* from being admitted to prove that she was married to Mr. Campbell of Carrick, before he was married to Jean Campbell. This interlocutor was appealed, and the judgment was of consent reversed 6th February, 1748, and both parties led their proof; Magdalen Cochrane accordingly alledged that Mr. Cockburn the episcopal clergyman who married them together with the Witnesses who were present, were dead, that Mr. Cockburn being afraid of the penalties of celebrating a clandestine marriage, had refused to grant a certificate, but declared that the certificate granted by Mr. Campbell was equally effectual as if granted by him; and Mr. Campbell accordingly granted the strongest certificate, declaring that he was that day married and that she was his wife: she produced that certificate, and she proved their previous courtship and a general report in the town of Paisly and neighbourhood of the marriage, at the time it was celebrated, and recent declarations to third parties by Mr. Campbell, that they had been married by Mr. Cockburn, and before his two servants the persons mentioned by the Pursuer, and there was evidence of the consummation, and of their having cohabited as man and wife, and there were no less than 128 letters all written by Mr. Campbell to her as his wife; in short there was a proof of marriage by declaration *de præsenti* and facts and circumstances, which in an ordinary case would

have been irresistible, but as she had been prevailed upon to keep the marriage secret on account of Mr. Campbell's situation, and after his second marriage at his earnest solicitation to save him from absolute ruin, the Deponent conceives that when the Commissioners found Magdalen Cochran's marriage not proved, and Jean Campbell's marriage established, they must have decided the case upon the second marriage, as a mid-impediment which prevented the evidence as to the first marriage, which did not amount to a celebration in *facie ecclesiæ*, receiving full effect. The case of Napier versus Napiers was of a similar description, the evidence of the first marriage by cohabitation habit and repute the Deponent thinks must have prevailed, had not a second marriage taken place in *facie ecclesiæ*. Lord Kilkerran p. 488, in reporting the opinion of the court in the case of Linen versus Hamilton, shows also that the court at that time first assembled, 1749, understood that in the case of a promise of marriage *cum copulâ subsequente*, a man by entering into another marriage in the meantime, might prevent the woman from pursuing for a declaration of marriage, as he states the opinion of the court to have been that if the man in the meantime married another woman, there could be no process for adherence, and he refers to the case of Kerr versus Hislop in 1796 as ascertaining this.

9. To the ninth article of the said allegation the Deponent deposes and says, That if a writing be holograph by the law of Scotland, it does not require the attestation of two competent witnesses, the Deponent has already stated that Charlotte Gordon cannot be an instrumentary witness.

DAVID CATHCART.

In the presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

And the same Witness being examined upon the Interrogatories for the said Johanna Dalrymple, the other Party in this Cause.

1. To the first of these Interrogatories this Respondent deposes and answers affirmative.

2. To the second Interrogatory the Respondent deposes and answers, That he thinks a marriage may be constituted in Scotland by promise and subsequent copula, or by a solemn verbal or written declaration of parties, if followed by consummation or cohabitation as man and wife, without reference to the legal domicile or place of the parties residence.

3. To the third Interrogatory the Respondent deposes and answers, That he thinks marriages celebrated at Gretna Green or other places in Scotland, will be effectual marriages although both parties were domiciled in England, provided the celebration, or what has followed upon it be sufficient to constitute a marriage by the law of Scotland, and the Respondent considers that this doctrine is confirmed by the decision of the court Wyche versus Blount, 27th June 1801.

4. To the fourth Interrogatory the Respondent deposes and answers, That he is not acquainted with any decision, maxim, or authority declaring that persons not domiciled in Scotland are not subject to the law of marriage there.

5. To the fifth Interrogatory the Respondent deposes and answers affirmative, except as to the last part, as he does not think any consent *de præsenti* except *in facie ecclesiæ rebus integris* can constitute a marriage in these circumstances, upon the grounds he has endeavoured to explain in his deposition in chief.

6. To the sixth Interrogatory the Respondent deposes and answers, That he apprehends that parties are entitled to resile from every obligation to marriage, provided that matters are entire, but if they have cohabited together subsequent to that obligation, he thinks they cannot resile.

7. To the seventh Interrogatory the Respondent deposes and answers, That Lord Stair's Institutes is a book of great authority in the law of Scotland. The passage alluded to in this Interrogatory must be considered with the context, and the Deponent doubts very much how far the doctrine which seems to arise from these words taken by themselves, can be recognized as the existing law of Scotland.

8. To the eighth Interrogatory the Respondent deposes and answers, That Erskine's Institutes is one of the latest institutional works of authority in the law of Scotland, but the Respondent does not think that the doctrine laid down in the passage quoted, has been recognized as the existing law of Scotland: In the last edition this doctrine is attempted to be corrected by a note of the editor referring to different causes decided since Mr. Erskine's book was written.

9. To the ninth Interrogatory the Respondent deposes and answers, That he thinks the case of Kello and Taylor would have been a decision in favour of this doctrine, had it not been reversed. In the case of Inglis and Robertson *concubitus* is not denied in the defences. The case of Calander versus Boyd the Respondent is not acquainted with. And in the case of Cochrane against Edmonstone it was admitted that he had slept with her the very night after the writing had been granted.

10. To the tenth Interrogatory the Respondent deposes and answers, That he thinks that the case of M'Lauchlane versus Dobson, and the case of More versus M'Iunes, had an opposite import to the doctrine here stated, and in the case of Taylor versus Kello although a specialty has been introduced into the judgment of the House of Lords reversing the decision of the courts below, yet the Respondent thinks this judgment completely shakes this case as an authority in support of the doctrine stated in this Interrogatory, and leaves room for founding on it as importing a contrary doctrine.

11. To the eleventh Interrogatory the Respondent deposes and answers, That he does not think that a solemn

written or verbal declaration of such consent, and not made in *facie ecclesie*, constitutes marriage by the law of Scotland, without either cohabitation or a subsequent copula.

12. To the twelfth Interrogatory the Respondent deposes and answers, That he has already taken notice of some distinctions betwixt M'Adam's case and the present: That case however certainly supports the doctrine in the Interrogatory, but he does not think that case well decided, and until it be decided in the House of Lords where an appeal has been entered, he cannot consider it as laying down the law of Scotland.

13. To the thirteenth Interrogatory the Respondent deposes and answers, That it has been decided (in the case of Johnston versus Smith, 18th November, 1766,) that in a declarator of marriage where the writings were neither holograph nor subscribed before witnesses they were not sufficient evidence, but in that case the party was dead.

14. To the fourteenth Interrogatory the Respondent deposes and answers, That he thinks where the party has judicially admitted that he did knowingly and deliberately write, and sign, and deliver the writings in question, the want of the solemnities to the writings is not of much consequence.

15. To the fifteenth Interrogatory the Respondent deposes and answers, That in the last case which he is acquainted with, the Court of Session found that the mother and sister of the pursuer in a declarator of marriage were not admissible witnesses.

16, 17. To the sixteenth and seventeenth Interrogatories the Respondent answers, That he is unacquainted with any cases in which this point has been argued, except in the cases of Pennycook against Grinton, Cochrane versus Campbell, and Napier versus Napiers, already taken notice of in his deposition in chief. In the first of these cases, the court found the second marriage null in respect that the first was proved. In the two last cases, although the evidence of the first marriage was fully as strong, the court gave effect to the second marriage, but without determining this point of

law. Lord Kaimes (in his Elucidations article 5th,) has given a decided opinion, that a second marriage *in facie ecclesie* would in such a case be effectual. And to the additional Interrogatories the Respondent deposes and answereth, That soon after these proceedings commenced as he believes, he received a retaining fee, and also a case with correspondence upon the part of Mrs. Laura Manners, and he understood himself to be retained as her counsel in the event of any proceedings on her part in Scotland, but he has given no advice upon the subject matter of the said action, or any way relative to the defence to be maintained against the claim and suit of the Plaintiff, nor has he ever attended any consultation in the cause.

DAVID CATHCART.

24th November, 1810.

Repeated and acknowledged at Edinburgh, before me the undersigned
WM. CALDER, Provost.

In the Presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the ALLEGATION and EXHIBITS given on behalf
of Mr. DALRYMPLE.

20th November, 1809.

ADAM GILLIES, Esq. of the city of Edinburgh,
Advocate, aged forty-three years, a Witness produced and sworn, deposes,

THAT he has practised as an Advocate before the Court of Session in Scotland, since the year 1787.

7, 8, 9. And to the seventh, eighth, and ninth articles of the said Allegation, the Deponent having attentively and deliberately perused and considered the several articles of the said Allegation with the Exhibits annexed thereto, and also the Libel given in the said cause on the part of Johanna Dalrymple the promoter, and the original Exhibits, marked Nos. 1, 2, 10 and 11, and the several original Letters annexed to the said Libel, he deposes and says, that he is of opinion that the laws and usages of Scotland, affirming the validity of marriage not proved to have been solemnized in the face of the church, do apply to a person resident in that country at the time when he is said to have contracted such marriage, although such person should only be quartered there as a soldier in the manner set forth in the Allegation, and although he should have his proper domicile not in Scotland but in England, or in any other foreign country. In some cases however it may be a circumstance of considerable importance, that the party against whom a declarator of marriage is brought in Scotland, has merely been casually resident instead of being regularly domiciled in that country. Thus where the pursuer of a declarator of marriage alleges cohabitation and habit and repute as man and wife, and founds on these circumstances as establishing a marriage with the defender, the Deponent thinks that it would be requisite that these Allegations should be proved by stronger and more pregnant evidence, in the case of a person whose residence in Scotland was casual and temporary, than in the case of one who is properly domiciled in that country. In both cases, the circumstances, by which cohabitation and habit and repute as man and wife are attempted to be established, must be of an uniform tenor so as to indicate the understanding of the parties that they are married to each other, which in every such case is necessary to constitute a marriage; but such understanding may fairly be inferred from fewer and slighter circumstances in the case of persons domiciled in Scotland than in the case of persons only casually resident in that country. The Deponent is further of opinion that the alleged promise, ac-

knowledge, or declaration of marriage as contained in the Paper-Writings, marked No. 1, No. 2, No. 10, and No. 11, derives no additional force from the circumstances of the parties having had carnal copulation together at any time previous to the dates of such writings, and if they had no carnal copulation together, and did not cohabit together as man and wife, and were not commonly reputed as such subsequent to the date of the said writings or any of them, the Deponent then thinks that the said promise, acknowledgment or declaration, upon the supposition that the writings in which it is contained afford legal evidence of the same, is not sufficient to constitute a valid and effectual marriage. The Deponent is further of opinion that the promise, acknowledgment or declaration contained in the writings already referred to, did not amount to more upon the part of Mr. Dalrymple than an obligation to solemnize a marriage in the face of the church at some future period, and this obligation is rendered ineffectual by his subsequent marriage duly and legally solemnized in England. The writings No. 2, and No. 10, above referred to, if they are as they are alleged to be of the hand-writing of Mr. Dalrymple the Defendant, do not require to be tested or subscribed by witnesses in order to be probative or to entitle them to bear faith in judgment; did such writings require to be tested, the attestation or signature of Charlotte Gordon could be of no avail; 1st, Because a female is incapable of being an instrumentary witness; and 2dly, Because it is requisite that there should be two witnesses to all deeds which are not sufficiently authenticated by the subscription of the party.

ADAM GILLIES.

In the presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

And the same Witness being examined on the Interrogatories given on behalf of Johanna Dalrymple, the other Party in this Cause.

1. To the first of these Interrogatories the Respondent deposes and answers, That he is of opinion that a marriage celebrated in Scotland in *facie ecclesiæ* between parties under twenty-one years of age, and without the consent of parents or of guardians, would be valid and effectual by the law of Scotland, although neither of the parties had any fixed domicile in that country.

2. To the second Interrogatory this Respondent deposes and answers, That as it consists of different parts, or rather as it involves several Interrogatories, he considers it necessary for the sake of distinctness to make a separate answer to each. 1st. It is asked whether marriage may not be constituted between parties in Scotland by promise and subsequent copula, with equal effect in point of validity as it may be by a celebration *facie ecclesiæ*.—Answer. In the Respondent's opinion, a marriage between parties in Scotland cannot be constituted with equal effect in point of validity by promise and subsequent copula, as by celebration in *facie ecclesiæ* : he considers this however as a point of much difficulty, and states his opinion upon it with much diffidence. He certainly thinks that by a promise and a subsequent copula, a party incurs an obligation to solemnize a marriage in face of the church, from which he is not at liberty to resile, and which, if no impediment intervened, would be enforced against him and his marriage declared by the courts of law in Scotland, but if prior to the institution of any such action of declarator of marriage, the party against whom it is brought had publicly married another woman, by a marriage duly proclaimed and regularly celebrated without objection in *facie ecclesiæ*, the Respondent should consider this as a legal impediment sufficient to prevent a decree of declarator of marriage from being pronounced in the action founded on the prior pro-

mise and copula, and he should think that the courts of law in Scotland would hold that the second marriage celebrated in *facie ecclesiæ* was valid, and consequently that the party Defendant was not bound to fulfil, or rather could not fulfil the obligation previously incurred by him by the promise and copula. The decision in the case of Pennycook against Grinton, 15th December, 1752, appears to be hostile to the opinion which the Respondent has now expressed, but in that case the marriage of Grinton with Ann Graite was not duly and regularly proclaimed and celebrated; And it appears to the Respondent that Lord Kames's remarks upon the decision in the case of Grinton, in his *Elucidations* respecting the law of Scotland, article the fifth, are sound and just. Secondly, It is asked whether marriage may not be constituted between parties in Scotland by solemn verbal or written declarations of consent *de presenti*, or of mutual acceptance of each other as husband and wife with equal effect in point of validity, as it may be by celebration in *facie ecclesiæ*.—Answer. The Respondent conceives from the way in which this Interrogatory is put, it is not easy to return a definitive answer to it. To make a marriage valid by the law of Scotland it is not necessary that it should be regularly celebrated in *facie ecclesiæ*, neither is it requisite that it should be celebrated by a clergyman or by a person actually in holy orders, but on the other hand the Respondent is of opinion that a simple consent to marry expressed *de presenti*, whether in writing or verbally before witnesses, is not *rebus integris* sufficient to constitute a valid marriage, and he conceives the law upon this point to be correctly stated in the following observation, which is said to have been made from the bench in the report of the case of M'Lauchlane against Dobson, 6th December, 1796. "Although by the law of Scotland there are no precise forms which are indispensable in the solemnization of marriage, yet *rebus integris* it can only be constituted by a consent adhibited in the presence of a clergyman, or in some other solemn mode equivalent to actual celebration." Lastly, it is asked whether in all cases marriage be not held to be constituted by the consent of the parties as expressed

at the time, and without reference to their legal domicile or place of residence?—Answer, The Respondent conceives that all parties resident in Scotland are, in regard to marriage, subject to the laws of Scotland, and he therefore thinks that if the consent of the parties as expressed at the time, is such as would be sufficient to constitute a valid marriage betwixt them, supposing them to be domiciled in Scotland, the same would be sufficient to make a valid marriage although they were both or either of them not domiciled in that country; at the same time it appears to the Respondent to be a circumstance of importance that both of the parties, or even that one of them is a foreigner, having no domicile in this country, as such circumstance may have material influence upon the opinion that may be formed as to the intention or understanding of such party in declaring his or her consent to the marriage. In every case where marriage is not duly celebrated in *facie ecclesiæ* it is an essential requisite that the intention of the parties to contract a valid marriage should be fully proved, and in judging of such a proof it may be a circumstance of considerable weight that one of the parties was a stranger and had no domicile in Scotland.

3. To the third Interrogatory the Respondent deposes and answers, That he is of opinion that marriages celebrated at Gretna Green, or other places in Scotland near the borders, between persons domiciled in England and recently arrived from that country are effectual marriages by the law of Scotland provided the celebration be such as would have made a valid marriage between parties domiciled in that country, and the Respondent thinks this was substantially found by the decree of the Court of Session in the case of Wyche against Blount, 27th of June, 1801, of which he understands that the circumstances were such as they are stated to have been in this Interrogatory.

4. To the fourth Interrogatory the Respondent deposes and answers, That he has already stated it as his opinion that parties in Scotland whether domiciled in that country or not, are subject to the Scotch law of marriage, and he is not

acquainted with any decision, maxim, or dictum of authority in the law of Scotland of a contrary tendency, neither does he know of any decision, maxim, or dictum of the law of Scotland declaring that parties in that country but not legally domiciled there will not be effectually married by deliberately performing those acts which constitute marriage between domiciled residents in Scotland; but he is of opinion as he formerly stated, that the circumstances of both or either of the parties having no domicile in Scotland, may be of importance in judging of their actual intention and meaning at the time when they performed those acts, from which their marriage is inferred, or by which it is attempted to be proved.

5. To the fifth Interrogatory the Respondent deposes and answers, That he is of opinion that a marriage celebrated in the face of the Scottish church between a Scottish woman and an English officer quartered with his regiment in Scotland will be valid and effectual by the law of Scotland, although such celebration may have been unattended with those observances necessary to make a marriage effectual in England. He farther thinks, under the qualification which he has already endeavoured to explain as to the effect which the circumstance of his being a foreigner might have, in the scale of evidence with regard to his intention, that in the case of an English officer quartered with his regiment in Scotland, the same effect would be given to a promise *subsequente copulâ*, as to a solemn written declaration *de præ-senti*, as in the case of a domiciled Scotchman.

6. To the sixth Interrogatory the Respondent deposes and answers, That he thinks there is such a thing recognized in the law of Scotland as an obligation to marry, which the parties can be absolutely bound to fulfil, and that they may not in all cases resile from a mere obligation being liable only to a claim of damages for breach of engagement.

7. To the seventh Interrogatory this Respondent deposes and answers, That Lord Stair's Institute is a work of great authority in the law of Scotland, but he does not think that his doctrine, as expressed in the short passage of that

work which is quoted in this Interrogatory, is recognized as the existing law of Scotland. Neither does he think that Lord Stair's own opinion on the subject can be fully or accurately collected from the words of this passage when taken by itself. It is explained, and in a great measure, qualified by the context, though in the whole of this section of his work it appears to the Respondent that Lord Stair has not expressed himself with his usual perspicuity : with a reference to the manner in which he and other writers on the law of Scotland have treated the subject of marriage, Lord Kaines, in his *Elucidations*, (page 29,) expresses himself as follows : " Few branches of our law are handled " with less precision than what particulars are necessary to " complete a marriage. There is a darkness and confusion " in our writers from jumbling together three points that " are clearly distinct. The first is what solemnities are ne- " cessary to complete a marriage ? The second, what cir- " cumstances are sufficient to presume that marriage has " been regularly solemnized ? And the third, what circum- " stances are sufficient to oblige a party by a process to " solemnize a marriage ? " The Respondent entirely concurs in the justness of these observations.

8. To the eighth Interrogatory the Respondent deposes and answers, That Mr. Erskine's *Institutes* is one of the latest institutional works of authority on the law of Scotland, but he does not think that his doctrine, as expressed in that passage of his *Institute* which is here quoted, is recognized as the existing law of Scotland, and accordingly by the last editor of Mr. Erskine's work, there is a note upon this passage, in which he states that from the later decisions of the court, (page 95,) " there is reason to doubt if it can " now be held as law that the private declarations of parties " even in writing, are *per se* equivalent to actual celebration " of marriage."

9. To the ninth Interrogatory the Respondent deposes and answers, That the doctrine said to be laid down by Lord Stair and Mr. Erskine, in these passages of their works

which are recited in the two last Interrogatories, does not appear to him to be recognized and confirmed by any of the decisions here alluded to. Had the judgment of the Court of Session, in the case of Taylor against Kello, remained unaltered, it would certainly have been a decision tending to confirm the doctrine said to be laid down by Mr. Erskine, but the decision of the Court of Session in that case was reversed by the House of Lords, and although the judgment of their Lordships bears to have proceeded upon special grounds, yet, on attending to the circumstances of the case the Respondent considers the reversal of the Court of Session's decree as a decision hostile to the doctrine mentioned in this Interrogatory. From the report of the case of Inglis against Robertson it appears that the Defendant did not deny *concubitus* which must have been subsequent as well as prior to the written declarations founded on. The case of Callander versus Boyd, is one with which the Respondent is not acquainted, and which is not reported so far as he can find; the case of Edmondstone versus Cochrane is in like manner not reported, but in that case also he understands that the declaration was followed by a copula.

10. To the tenth Interrogatory the Respondent deposes and answers, That judgments of an opposite import appear to him to have been pronounced in the Court of Session and by the House of Lords in the following cases, viz. M'Innes versus More, December 20th, 1781; Anderson versus Fullerton, Nov. 13th, 1795; and M'Lauchlane versus Dobson, 16th Dec. 1796. In the first of the cases above-mentioned there was a written acknowledgment or declaration of marriage *de præsenti*; and in the last case, that of Dobson, there was a verbal declaration *de præsenti*, in presence of witnesses, and that preceded by a long correspondence wherein the parties styled each other husband and wife, which the Respondent conceives to be fully equivalent to a written declaration of consent *de præsenti*. In answer to the remaining part of this Interrogatory which regards the reversal of the judg-

ment in Taylor versus Kello, the Respondent has stated already all that occurs to him.

11. To the eleventh Interrogatory [this Respondent deposes and answers, That he does not distinctly comprehend what is meant by the term solemn as it seems applied in this Interrogatory, and in some preceding ones to a consent *de præsenti*, or declaration of marriage, when such consent or declaration has not been exhibited or made in presence of a clergyman, or accompanied with any ceremony such as can be deemed equivalent to actual celebration. The Respondent is however of opinion that a consent *de præsenti* expressed verbally before witnesses, and without particular ceremony or solemnity is not sufficient *per se* to constitute a valid marriage. And he also thinks that declarations or acknowledgments of marriage in writing interchanged betwixt the parties privately, and without the intervention of witnesses, are not sufficient *rebus integris* to constitute a valid marriage.

12. To the twelfth Interrogatory this Respondent deposes and answers, That in the case of M'Adam versus M'Adam, a verbal declaration of consent *de præsenti* made in the presence of witnesses called or assembled together for the purpose, was sustained as a sufficient ground for a declarator of marriage. But in that case no attempt was made by either of the parties to resile, as indeed the declaration was followed a few hours after by the death of one of them; with respect to this case, however, it is to be observed, that the judgment pronounced in it by the Court of Session is not final, but is now under appeal to the House of Lords, in which it may possibly be reversed, and the Respondent does not therefore consider that judgment as fixing any point of law with the exception of the case of M'Adam, the Respondent does not know of any in which a simple consent *de præsenti* expressed verbally before witnesses was held sufficient *rebus integris* to constitute a valid marriage, and he is of opinion that in the various writings annexed to the Libel in the present case there are not contained such full and ex-

plicit declarations *de præsenti* as have been found sufficient to make a valid marriage in any case with which he is acquainted.

13. To the thirteenth Interrogatory the Respondent deposes and answers, That if it were law that a written declaration of marriage was sufficient *per se* to constitute a marriage, he thinks it would follow that such declarations would be held to be among the writings to which the solemnities of formal deeds are required by the law of Scotland; upon the supposition which has been made such writings would be truly deeds of importance to the validity of which, unless holograph of the party, such solemnities are essential. In answer to the remaining part of this Interrogatory the Respondent can only say that in none of the cases already referred to does it appear to him that a written declaration of marriage *per se* was found to constitute a valid marriage.

14. To the fourteenth Interrogatory the Respondent deposes and answers, That in a question of marriage, or in any question of personal obligation, he thinks the want of the solemnities above-mentioned will be sufficiently supplied by the judicial admission of the party that he did knowingly and deliberately write or sign and deliver the writings in question.

15. To the fifteenth Interrogatory the Respondent deposes and answers, He thinks that a sister or other near relation, such as an uncle or an aunt, cannot be examined as a witness even in an occult family transaction, such as a clandestine marriage, where there is a *penuria testium*. Nor is the objection to the admissibility of a sister removed by the circumstance of her being a subscribing witness to the writing which she is to authenticate.

16. To the sixteenth Interrogatory the Respondent deposes and answers, That there is no decision nor any other authority in the law of Scotland for holding that a party already actually married can validly enter into a second marriage, but he conceives that a party may make promises and declarations, and perform acts by which he incurs a valid obliga-

tion to solemnize a marriage, and that such obligation will be enforced against him if an action for that purpose is brought before he enters into a second marriage, and will not be enforced against him if the action is delayed until a second marriage is contracted, and this opinion seems to be confirmed by the judgment of the Court of Session in the case of Cochrane against Campbell, which judgment was affirmed by the House of Lords on the 31st of January, 1753.

17. To the seventeenth Interrogatory the Respondent deposes and answers, That with regard to the decision in the case of Pennycook versus Grinton, he has already stated all that has occurred to him. He considers the judgments in the Court of Session, and of the House of Lords, in the case of Campbell to which he has just alluded, to be of an opposite tendency to the decision of the Court of Session in the case of Grinton, as the proof of the prior marriage in that case appears to the Respondent to have been stronger than in the case of Grinton.

ADAM GILLIES.

HARRY DAVIDSON, Notary Public and Actuary assumed.

And the same Witness being examined upon the additional Interrogatories given on behalf of the said Johanna Dalrymple.

1. To the first of these additional Interrogatories the Respondent deposes and answers, That he is of counsel for Mr. Dalrymple, the Defendant in this Cause, and has since its first commencement been occasionally employed by him in conducting his defence.

2. To the second additional Interrogatory the Respondent deposes and answers, that he did give his advice and assistance in preparing and framing the cross Interrogatories

here mentioned, but this part of the business was conducted chiefly according to the directions of Mr. Clerk, a preceding witness examined in this cause, and the Respondent does not think that he himself prepared any of the cross Interrogatories, though some additions or alterations may have been suggested by him and adopted.

3. To the third additional Interrogatory the Respondent deposes and answers, That according to the best of his recollection he did not give any advice and assistance in preparing, altering, or revising the Allegation or pretended Allegation mentioned in this Interrogatory.

4. To the fourth additional Interrogatory the Respondent deposes and answers, that as counsel for the Defendant he did suggest or advise the plea here mentioned as now maintained by him, and at the time of giving that advice he believes he was informed by his employer, and consequently he would take it for granted, that the Plaintiff was in the thorough knowledge not only that the Defendant had returned to Britain, but also of his courtship of, and intended marriage with Miss Manners.

5. To the fifth additional Interrogatory the Respondent deposes and answers, That the supposition which is here put would have had little or no influence with him in forming his opinion upon the point mentioned in this Interrogatory.

ADAM GILLIES,

26th November, 1810.

Repeated and acknowledged at Edinburgh before me the undersigned
WM. CALDER, Provost.

In the presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the ALLEGATION and EXHIBITS given on
behalf of Mr. DALRYMPLE.

22d October, 1810.

SIR ILAY CAMPBELL, Baronet, late Lord President of the Court of Session in Scotland, aged seventy-six years, a Witness, produced and sworn, deposes, That prior to the month of November 1808, he was for nineteen years President of the said Court, and to the seventh, eighth and ninth articles of the said Allegation, this Deponent having attentively and deliberately considered the several articles of the said Allegation with the Exhibits annexed, and also the Libel given in this cause on the part of Johanna Dalrymple, the Promoter, and the original Exhibits, marked No. 1, 2, 10, 11, and the several original letters annexed to the said Libel, he deposes and says, that the general principle of the law of Scotland with respect to marriage is, that it is perfected by the mutual consent of parties accepting each other as husband and wife. The solemnities of a regular marriage, although required as matter of order and as the most unexceptionable form of entering into that state, are not held to be indispensable, and accordingly irregular marriages, *i. e.* without the usual forms, are very common in Scotland: as the consent however which is necessary to constitute the matrimonial contract, must be deliberate and serious, clearly denoting the intention of the parties to become husband and wife, and attended with no ambiguity, questions often arise concerning the validity of irregular marriages, and the decision of these must of course depend in a great measure on the circumstances of each particular case. An irregular marriage may be constituted, or rather it may be said, proved in various ways.

1st by cohabitation as husband and wife at bed and board,

and general habit and repnte. This has even been sanctioned by statute (1503, c. 77) and forms a presumption so strong scarcely to be called in question.

2d. By promise *de futuro* and copula following upon it, because the engagement though having a reference to future time is supposed to be purified by the act of consummation, and rendered a present contract, if there be no middle impediment to bar the claim.

3d. By formal acknowledgments *per verba de præsenti* either in writing, or declared before witnesses, though not in presence of a clergyman; but these must appear to have been made with the deliberate intention of living together as husband and wife, and must be attended with personal intercourse if not subsequent, at least prior, otherwise they will resolve into a mere *stipulatio sponsalitia*, similar to what is in every contract of marriage in the Scots form, which proceeds on a recital that the parties have accepted of each other as husband and wife, but which may be resiled from, *rebus integris*. The Court of Session was of this opinion in the case of M'Lachlane against Dobson, 6th Dec. 1796, which the Deponent apprehends was rightly decided. Had there been either an antecedent or a subsequent copula by which matters were not entire, it is probable that the court would have decided otherwise; though this is not clear, as there were circumstances tending to shew that the parties did not truly mean to live together, and both of them admitted that there never was cohabitation of any kind between them. In the case of a regular marriage in *facie ecclesiæ*, celebrated by a clergyman, it may happen that the parties may accidentally be prevented from going together, *e. gr.* the man or the woman may die suddenly before any bedding. Yet the Deponent conceives that the status of marriage would be complete, agreeably to the maxim *consensus non concubitus facit matrimonium*, but every thing short of the actual and regular ceremony ought to be considered in a different light. These doctrines of the law of Scotland are treated more fully in our law books. The latest author, who of course takes notice of all the modern decisions upon the subject, is Mr. Hutchison. See his book on Jus-

tice of Peace Jurisdiction, second edition, Book iii. chap. 8. The cases of M^cInnes against More, and Taylor against Kello, with the judgments upon them in the House of Lords; likewise the case of M^cCulloch, 10th Feb. 1759, with the reversal in the House of Lords, may be particularly attended to, as it seems to have been thought in these cases that the Court below had gone rather too far in sustaining equivocal evidence of marriage. In the present case (Dalrymple against Dalrymple) habit and repute or any known cohabitation as husband and wife are out of the question, so far as appears to the Deponent from any of the materials laid before him, and therefore the first of the above grounds for declaring marriage does not apply. The second is in part made out by written evidence, for the writing No. 1, which, if acknowledged or proved to be holograph, contains a clear promise of marriage, or rather mutual promises; but the subsequent consummation is disputed, which therefore must depend upon proof, and if proved it will then be for the judge to consider whether this ground for declaring a marriage is or is not effectually opposed by other circumstances requiring to be attended to, such as those to be afterwards mentioned. The third is also so far proved *scripto* by the Writing, No. 2, which contains a very explicit mutual declaration of marriage *de præsenti*, and by various letters under the hand of the party, John William Henry Dalrymple, (No. 3, &c.) all of which it is alleged are holograph, and if they are either proved or admitted to be so they of course by our law are to be held as authentic; and it is immaterial that they are not signed by witnesses, for holograph writings do not require witnesses, except to prove their dates, and nothing here seems to turn upon the precise dates, as the first ten or twelve of them appear from their contents to have been written before the party, John William Henry Dalrymple left Scotland, and the others soon after, and evidently before any middle impediment existed by marrying another. But before any conclusive inference can be drawn from these written acknowledgments of marriage however direct, it is necessary that all

the circumstances attending them should be carefully examined. The Deponent does not consider it a good objection on the part of Mr. Dalrymple that he was an English officer, having no permanent domicile in Scotland but only there transiently with his regiment. Were this a question concerning his intestate personal succession the Deponent would consider England and not Scotland to be at present and to have been at that time the country of his domicile, the laws of which would of course be alone considered as regulating the question of succession, but the present seems to the Deponent to be a case of a different nature.

Mr. Dalrymple while in Scotland was capable of contracting debt there, and of being sued for it if found within the jurisdiction; he was also capable of contracting marriage there especially with a Scots lady, the marriage being entered into according to any form recognized by the law of that country to be good, for which reason all the Gretna-Green marriages are held to be good, though uniformly irregular; and although by the marriage act they could not have been so made in England. But in examining the circumstances of the present case the youth and inexperience of the party, John William Henry Dalrymple, and his being a stranger to the customs of the country may perhaps enter into the consideration of the judge along with other circumstances, though it must also be kept in view that he was of sufficient age to marry. Another circumstance which may be thought somewhat unfavourable to the lady is that she seems to have agreed by the Writing, No. 10, to an indefinite obligation of secrecy, and to have accepted of a similar engagement on the part of the gentleman, implying a new reference to future time, not altogether consistent with the idea of present marriage. The mutual consent in the Writing, No. 2, being of an unqualified nature, ought not to have been thrown loose by the suspensive and qualified obligation in No. 10. This at least is a circumstance deserving to be considered. It is said that one of the writings of No. 10 was not properly tested, and they both appear to be of the same hand-writing;

but these alleged informalities seem to be of little consequence, as the writing whether holograph of the Promoter, Johanna Dalrymple, or only signed by her, was taken into her possession, and produced by her as evidence, and it is neither the better nor the worse for being also signed by her sister. Further, the long silence of the lady as well as the gentleman after the correspondence ceased, by which both the one and the other might be put off their guard and third parties might be deceived, are circumstances which in such a case cannot be laid out of view. It is not said there was any child in the case or any personal intercourse subsequent to the gentleman's leaving Scotland in summer 1804, the whole written evidence of their prior connection seems to have been in the hands of one of the parties, and consequently in her power, and no step was taken to interpel marriage with another. These are circumstances which call for explanation. The case of Magdalen Cochrane against Campbell in 1747, which is to be found in Falconer's Collection, and is likewise detailed in Mr. Hutchinson's book, Vol. 4, App. iii. p. 26, seems proper to be attended to. It is also noticed in the Dictionary of Decisions, Vol. 4, *Voce* personal Objections, p. 79. These hints the Deponent merely throws out as connected with the question of law, upon which alone he presumes his evidence is required. They are submitted with the greatest deference to the very able and respectable judge who is to try the cause. He abstains from drawing any ultimate conclusion for two reasons; first, because the whole merits of the case are not before him; secondly, because it would be presumptuous in him to do so when he is called merely as a witness.

ILAY CAMPBELL.

In presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

The same Witness examined on the Interrogatories given on behalf of the said Johanna Dalrymple, the other Party in this Cause.

1, 2, 3, 4, 5. To the first, second, third, fourth and fifth Interrogatories this Respondent answereth and saith, That in his deposition already given as aforesaid, he has sufficiently answered them.

6. To the sixth of these Interrogatories he deposes and says, That an obligation to marry having relation to future time may be resiled from *rebus integris*; but the question of damages for breach of engagement remains entire.

7, 8. To the seventh and eighth Interrogatories he deposes and says, That both Lord Stair's and Mr. Erskine's Institutes are books of authority on the law of Scotland.

9, 10. To the ninth and tenth Interrogatories he deposes and says, That the decisions will speak for themselves.

11. To the eleventh Interrogatory he deposes and says, That it is already answered in his deposition in chief, as aforesaid.

12. To the twelfth Interrogatory he deposes and says, That he understands the case of M^cAdam to be still in dependence before the House of Lords. He avoided saying any thing about it in his deposition as aforesaid, but since the question is asked, he is bound to answer that the judgment of the Court of Session was such as the Interrogatory describes it to have been, but that he the Respondent, and some others of the judges, disapproved of the judgment or decision, and he and they thought the case very similar to that of Fullarton where a posthumous marriage was found to be bad.

13, 14. To the thirteenth and fourteenth Interrogatories he deposes and says, They are already answered in his deposition in chief as aforesaid.

15. To the fifteenth Interrogatory he deposes and says, That he is humbly of opinion that as marriage ought to be

public a sister ought not to be admitted as a good witness on the pretence of *penuria testium*.

16, 17. To the sixteenth and seventeenth Interrogatories he deposes and says, That he has already suggested that the case of Magdalen Cochrane against Campbell ought to be looked into, where there appears to have been a written acknowledgment of marriage, but where the Pursuer who had allowed a marriage to take place with another lady, was ultimately unsuccessful. If the decision in the case of Grinton and Graite can be at all justified it is upon the ground that the second marriage was also irregular. The Respondent has already said that in judging of irregular marriages every circumstance attending the case must be taken into view.

ILAY CAMPBELL.

23d Oct. 1810.

Repeated and acknowledged at Glasgow, before me the undersigned,
W. FERGUSON, one of the Baillies
of Glasgow.

In the presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the ALLEGATION and EXHIBITS given on behalf
of Mrs. DALRYMPLE.

23d February, 1811.

SAMUEL HAWKINS, of Findon, in the County of Sussex, Esq. but at present residing in Parliament Street, Westminster, in the County of Middlesex, aged upwards of fifty years, a Witness produced and sworn.

1. TO the first article of the said Allegation the Deponent saith, That in the latter end of the year 1805, or beginning of the year 1806, he became very intimately acquainted with the Honourable General William Dalrymple (now deceased) the father of John William Henry Dalrymple, Esq. one of the Parties in this Cause, and in the course of the frequent conversations, the said General Dalrymple, and the Deponent had together, he the Deponent learnt that the said John William Henry Dalrymple, the son of the said General Dalrymple, was at that time an officer in his Majesty's 35th regiment of foot, and was at Malta; and he saith that the said John William Henry Dalrymple, Party in this Cause, having attained the age of twenty-one years, and become entitled to receive a considerable sum of money, under the marriage settlement, or will of his late mother, left his regiment and returned to England unknown to his father, the said General Dalrymple, in the month of August, 1806, in order to get possession of such sum of money, which he the said John William Henry Dalrymple, had so become entitled to receive, as also to settle his affairs; and some of the most intimate friends of the said General Dalrymple, who knew of the said John William Henry Dalrymple's return to England, apprehending from the bodily infirmity which the said General Dalrymple laboured under, and from the natural violence of his temper, and his high sense of honour,

that if he knew of his said son having left his regiment and come to England, it would not only have a bad effect on him the said General Dalrymple, but might also cause him to disinherit his said son, did to avoid such apprehended ill consequences prevail on the said John William Henry Dalrymple, Party in this Cause, to conceal his so being in England from his said father, and on account of the known confidence which the said General Dalrymple had in the Deponent, an introduction of the said John William Henry Dalrymple, and the Deponent to each other was brought about by the said friends of the said General and his said son, for the purpose of getting the Deponent to arrange the said business between them the said General Dalrymple and his said son, without its being known to the said General Dalrymple that his said son was in England, and by means of such introduction, he the Deponent first came to know the person of the said John William Henry Dalrymple, Party in this Cause, and in consequence thereof, and to prevent the aforesaid apprehended mischiefs both to the said General Dalrymple and his said son, the Deponent undertook and accomplished the arrangement of such aforesaid business, without the said General knowing, or even suspecting that his said son was in England. That the Deponent afterwards, whilst the said John William Henry Dalrymple so remained in England, unknown to his said father, became the confidential friend and agent of the said John William Henry Dalrymple, Party in this Cause, who in various conversations communicated to the Deponent many circumstances respecting a connection he stated he had had with a Miss Johanna Gordon at Edinburgh, (which the Deponent had previously heard the said General Dalrymple speak of, and which connection he supposed he had completely got rid of) and the said John William Henry Dalrymple at the same time expressed his fears that the said Johanna Gordon would be writing to and troubling his father, the said General Dalrymple upon that subject, as well as tormenting him the said John William Henry Dalrymple with letters, to avoid which, he begged the Deponent not to forward any of her letters to him, the said

John William Henry Dalrymple (who was then about to go to the continent of Europe,) and in order to enable the Deponent to know her hand-writing, and to distinguish her letters from any others, he the said John William Henry Dalrymple then cut off the superscription from one of her letters to him, which he then gave to the Deponent for that purpose, and at the same time swore that if the Deponent did forward any letters of her the said Johanna Gordon to him the said John William Henry Dalrymple, he never would read any of them, and he also desired and intreated the Deponent to prevent any of the said Johanna Gordon's letters from falling into the hands of the said General Dalrymple, and afterwards, to wit on or about the month of September in the said year 1806, he the said John William Henry Dalrymple left England, and went to the continent of Europe. That the Deponent from the opportunity which was afforded him by his being almost constantly with the said General Dalrymple did find means to prevent several of the said Johanna Gordon's letters addressed to the said General Dalrymple, from being received by him, but having found considerable risk and difficulty therein, and in order to put a stop to the said Johanna Gordon writing any more letters to the said General Dalrymple, he the Deponent did himself write and address a letter to her the said Johanna Gordon at Edinburgh, wherein he stated that the letters which she had as aforesaid sent to the said General Dalrymple, had fallen into his the Deponent's hands, to peruse or to answer as the said General Dalrymple was himself precluded from taking any notice of letters from the precarious state he was in, or to that effect, and urged the propriety of her desisting from sending any more letters to the said General Dalrymple; and the Deponent having in his said letter mentioned that he was in the confidence of and in correspondence with the said John William Henry Dalrymple, she the said Johanna Gordon, now called Dalrymple, soon afterwards commenced a correspondence with the Deponent respecting the said John William Henry Dalrymple, Party in this Cause, and also sent many letters addressed

to the said John William Henry Dalrymple, to him the Deponent to get forwarded to the said John William Henry Dalrymple, but the said John William Henry Dalrymple having as predeposed, particularly desired the Deponent not to forward any such letters to him, he the Deponent kept many of such letters back, and did not send them to their address, but whether he kept all such letters back, or whether he forwarded any of them to the said John William Henry Dalrymple, to whom they were addressed, he the Deponent cannot depose with any certainty, but thinks that he did send one or two of the said Johanna Gordon's letters to the said John William Henry Dalrymple, in consequence of her continued importunities for that purpose, but the Deponent can by no means say that the same were received by the said John William Henry Dalrymple, if he the Deponent did actually forward any of such letters. And the Deponent further saith, that it was sometime in the latter end of the year 1806, or beginning of the year 1807, that the correspondence between the said Johanna Gordon, now called Dalrymple (who is one of the Parties in this Cause,) and himself first commenced; and that after the death of the said General Dalrymple, which, to the best of the Deponent's recollection, happened sometime in or about the spring of the year 1807, she the said Johanna Dalrymple, formerly Gordon, Party in this Cause, in her said correspondence with the Deponent, expressly asserted and declared to him her marriage with the said John William Henry Dalrymple, and the Deponent being desirous of knowing and of being furnished with the particulars thereof, wrote to the said Johanna Dalrymple, under the address of Miss Gordon, for such particulars, who thereupon communicated the particulars of her marriage with the said John William Henry Dalrymple, and furnished him the Deponent with a copy of the original Paper-Writings or Exhibits marked No. 1, and 2, annexed to the Libel, given in and admitted in this Cause, the said Exhibit marked No. 1, being the original written promise of marriage, purporting to have been signed and exchanged by and between the said John William Henry Dalrymple, and

Johanna Dalrymple, then Gordon, Parties in this Cause, and the said Exhibit marked No. 2, being the original marriage contract or instrument in writing, also purporting to have been signed by them the said John William Henry Dalrymple and Johanna Dalrymple, then Johanna Gordon, spinster, on the 28th day of May, 1804, which to the best of the Deponent's recollection, she called her lines of marriage, and the Deponent afterwards wrote in very strong language to him the said John William Henry Dalrymple on the subject of such his marriage, and also respecting some bills left unpaid by him and which she the said Johanna Dalrymple formerly Gordon, had been called upon to discharge, and had desired the Deponent to mention in his letter to the said John William Henry Dalrymple; and the Deponent hath no doubt that the said John William Henry Dalrymple received such the Deponent's letters, because the said John William Henry Dalrymple replied thereto from Berlin to Vienna, in the said year 1807, and caused the said bills to be paid through the medium of Messrs. Coutts and Co. bankers, London. And he further saith, that in the latter end of May, in the year 1808, the said John William Henry Dalrymple returned again to England, and in a day or two after his arrival in London he went (as he informed the Deponent,) to Bright-helmstone in hopes of finding the Deponent there, but having been disappointed therein, he came to the Deponent's house at Findon, near Shoreham, where having met the Deponent, they conversed together upon the said John William Henry Dalrymple's affairs, and particularly upon his the said John William Henry Dalrymple's marriage with the said Johanna Dalrymple, formerly Gordon, Party in this Cause, and on that occasion the Deponent shewed the said John William Henry Dalrymple the proofs of such marriage, which she the said Johanna Dalrymple, had as aforesaid, furnished to him the Deponent, and the Deponent fearing from the manner and conduct of the said John William Henry Dalrymple, that he had it in contemplation to marry Miss Manners, the sister of the Dutchess of St. Albans, notwithstanding his aforesaid

marriage with the said Johanna Dalrymple, formerly Gordon, cautioned him against taking such a step, and in the strongest language in which the Deponent was able to express himself, described the mischiefs which he the said John William Henry Dalrymple would thereby bring upon himself and the said Miss Manners, and the difficulties in which their respective families might be placed from the said John William Henry Dalrymple having been previously married to the said Johanna Dalrymple, formerly Gordon; and the Deponent imagined that he had deterred the said John William Henry Dalrymple from marrying the said Miss Manners, though the Deponent saith, that at the time aforesaid, he the said John William Henry Dalrymple, took almost by force from the Deponent some of the said Johanna Dalrymple's letters, addressed to him the Deponent, and particularly those annexed to the Allegation given in this Cause, on behalf of the said John William Henry Dalrymple, under pretence of shewing them to Lord Stair, and seemed by his manner and expressions to consider that he had thereby possessed himself of the means of shewing that the said Johanna Dalrymple was not his wife. And the Deponent further saith, That he does not think it possible that at the time the said Johanna Dalrymple wrote and sent to him the Deponent the letter marked (A) annexed to the aforesaid Allegation of him the said John William Henry Dalrymple, she could have been credibly informed or could have known that the said John William Henry Dalrymple was about to solemnize a marriage in England with another lady, but believes that she wrote the same from having merely heard some vague reports as is therein-mentioned, and the Deponent in answer thereto informed her by letter, written by himself, and dated 11th December, 1807, that the then most extraordinary situation of this country with all parts of the continent had effectually indeed cut off every sort of intercourse, that he was wholly at a loss in what way to forward a letter to the said John William Henry Dalrymple, and that he must be so much so himself; that he the Deponent

had no expectation then of hearing from him until matters took a more favourable turn, and that in Mr. Dalrymple's different letters, particularly the last of them (which letter was dated from Vienna) the Deponent was given to understand by him the said John William Henry Dalrymple, that in place of two years the first time limited for his stay, he should not think of quitting the continent at all, being heartily disgusted with England and its society. And he lastly saith, That having in the course of a few days after the said John William Henry Dalrymple had as aforesaid called upon the Deponent, at his said house at Findon, in the latter end of the month of May, 1808, received letters from two very particular friends of the late General Dalrymple, viz. from Mark Davis, Esquire, and Dr. Mosely, informing the Deponent that on the very day after the said John William Henry Dalrymple's return to London from Findon, at the time aforesaid, he the said John William Henry Dalrymple was on that day married to Miss Manners; the Deponent thereupon, to wit on the 7th day of June, 1808, wrote and sent a letter from Findon, bearing that date, to the aforesaid Johanna Dalrymple, Party in this Cause, under the address of Miss Gordon, mentioning his great surprize a few days preceding, by the arrival of the aforesaid John William Henry Dalrymple at his the Deponent's said house at Findon, and also mentioning that his surprize had been very much exceeded indeed by his having received the aforesaid letters from the before-mentioned friends of the late General Dalrymple, informing him the Deponent of the said John William Henry Dalrymple having married Miss Manners on the very day after his return from Findon to London, and the Deponent verily believes, that she the said Johanna Dalrymple did not know of the arrival of the said John William Henry Dalrymple in England, until she received the Deponent's said letter of the 7th of June, 1808; and further to the said article he cannot depose.

2. To the second article of the said Allegation and to the Paper-Writings or Exhibits, marked No. 16, No. 18, No. 19,

and No. 20, to the said Allegation annexed and in the said second article pleaded and referred to, the said Exhibits No. 16, purporting to be an original letter written by the said John William Henry Dalrymple to the said Johanna Dalrymple, under the address of "Miss Gordon," bearing date Portsmouth, 19th July, 1805; the said Exhibits No. 18, and No. 19, being two original letters written and sent by the Deponent by the General Post to the said Johanna Dalrymple, under the same address during the time the said John William Henry Dalrymple was abroad as pre-deposed; and the said Exhibit marked No. 20, being a like original letter written and sent by the Deponent by the General Post to her the said Johanna Dalrymple, under the same address, after the return of the said John William Henry Dalrymple and the pretended marriage aforesaid; the said several Exhibits having been now produced and shewn to the Deponent, and he having carefully viewed and perused the same, he saith, That he is well acquainted with the manner and character of hand-writing and subscription of him the said John William Henry Dalrymple, from having frequently, seen him write and subscribe his name, and from having often received letters from him and seen his writing, and the Deponent hath not a doubt but verily believes that the whole bodies, series and contents of the said Exhibit No. 16, the date and subscription thereto and the address thereon, were and are of the proper hand-writing and subscription of the said John William Henry Dalrymple, Party in this Cause; and he also saith, That the whole body, series and contents of the said Exhibits No. 18, No. 19, and No. 20, and the date and subscriptions thereto and the addresses of the Exhibits No. 18, and No. 20, were and are all of his the Deponent's own proper hand-writing and subscription, and are the original letters written and sent by him as aforesaid. And he lastly saith, that "Miss Gordon" and "Miss J. Gordon" to whom the said letters were written, addressed and sent by the said John William Henry Dalrymple, Party in this Cause, and by him the Deponent, and Johanna Dalrymple, wife of the said John William Henry Dalrymple, also

Party in this Cause, was and is one and the same person and not divers ; and further he cannot depose.

SAMUEL HAWKINS.

2d March, 1811.

Repeated and acknowledged before
Dr. DAUBENY, Surrogate.

PRES. MARK MORLEY,
Notary Public.

On the ALLEGATION and EXHIBITS given on
behalf of Mrs. DALRYMPLE.

25th February, 1811.

SIR RUPERT GEORGE, of Park Place, St. James
Street, in the county of Middlesex, Baronet, aged
sixty years, a Witness produced and sworn.

1. TO the first article of the said Allegation the Deponent saith, That he is Chairman or First Commissioner of the Board of Transports, &c. and hath so been from Michaelmas in the year 1795, to the present time, and he saith that he knew and was well acquainted with General William Dalrymple the father of John William Henry Dalrymple, Esq. Party in this Cause, for many years, and came to know him the said John William Henry Dalrymple, Party in this Cause, by seeing him at his said father's table ; and the Deponent well remembers that the said John William Henry Dalrymple, going out to Malta to join his Majesty's Thirty-fifth

Regiment of Foot, on being appointed an officer in that Regiment, which to the best of the Deponent's recollection happened some time in or about the year 1805, on which occasion the said General Dalrymple applied to the Deponent to get him the said John William Henry Dalrymple a passage out to Malta, who in consequence thereof came to the Deponent at the Transport Office previous to quitting England for the purpose aforesaid, but no request was made to the Deponent by the said John William Henry Dalrymple to forward any letters to him at Malta; but the Deponent saith, that after the said John William Henry Dalrymple had quitted England, to go to Malta, he the Deponent (though he cannot recollect the time) did receive some letters at the Transport Office, under cover from Edinburgh, which letters were addressed to him the said John William Henry Dalrymple, Party in this Cause, at Malta, and the same purported by the letter or cover in which they came to the Deponent, to have been written by a person subscribing himself Nicholas Webb, and the Deponent as desired accordingly forwarded the said letters to Malta, for delivery to him the said John William Henry Dalrymple, but whether they were or were not received by him, he the Deponent cannot depose. And the Deponent further saith, That he has for many years been in the habit of receiving letters from many persons to get forwarded to their friends abroad, and it has been his custom not to acknowledge the receipt of such letters unless particularly requested so to do; but having in or about the beginning of the month of July, in the year 1806, received a letter from the aforesaid person subscribing the name of Nicholas Webb, enquiring whether the letters which had been as aforesaid inclosed to him the Deponent, to be forwarded to the said John William Henry Dalrymple, had been so forwarded, and also enquiring whether he the Deponent knew whether the said John William Henry Dalrymple had then arrived in England or not, and requesting the Deponent to address his answer to Nicholas Webb, at the Post Office, till called for, Edinburgh, he the Deponent

did accordingly, on the 4th day of the said month of July, 1806, write and send a reply to the said letter, and did address the same as follows, "Nicholas Webb, Esq. Post Office, till called for, Edinburgh;" and further to the said article he cannot depose.

2. To the second article of the said Allegation and to the Paper-Writing or Exhibit, marked No. 17, thereto annexed, and in the said article particularly pleaded and referred to, and now produced and shewn to the Deponent, he saith, That the said Paper-Writing or Exhibit is the very identical original letter which he so as aforesaid wrote and sent in reply to, and to the address of Nicholas Webb, Esq. at the Post Office, till called for, Edinburgh, as is by him the Deponent herein-before deposed, the whole body, series and contents of the same, and also the date and subscription thereto, and the superscription thereon being as the Deponent saith they are all of his the Deponent's own proper hand-writing and subscription, whereby he is enabled to identify the same; and further he cannot depose.

RUPERT GEORGE.

Same day.

The said Sir Rupert George, Bart.
repeated and acknowledged this
his Deposition before
Dr. STEPHEN LUSHINGTON, Surrogate.

Pres. MARK MORLEY,
Not. Pub.

On the ALLEGATION and EXHIBITS given on behalf
of Mrs. DALRYMPLE.

15th March, 1811.

JAMES ROY, Clerk in his Majesty's Excise Office in the City of Edinburgh, aged about thirty-three years, a witness produced and sworn, deposes and says, That he was clerk to Charles Gordon, Esq. of Cluny, the father of Mrs. Johanna Dalrymple, the party promoter of this cause, during the years 1805, 1806, 1807, and for several years before, and he left his service about the fourth of June, 1808; that he kept Mr. Gordon's books, and he was succeeded in that department by John Laing, another clerk of Mr. Gordon's; That it was part of the Deponent's duty during the years above-mentioned to take charge of the letters to and from the Post-Office, and to call for Mr. Gordon's letters and those of his family daily at the Post-Office, and the letters so received by him he delivered to those members of the family to whom they were addressed, and he charged the postage in the postage book to their respective accounts. That in the postage book kept by him, and in the account of postages therein charged against the said Mrs. Johanna Dalrymple, there is an entry on the 23d of July, 1805, in these words: "Paid postage from Portsmouth 1s. 1d." and this is the only entry in her account of that date. And the witness being shewn the letter, No. 16, of the Exhibits, annexed to the aforesaid Allegation, he deposes and says, that he observed the said letter is addressed to "Miss Gordon, Braid, near Edinburgh," and has the Portsmouth mark, with the Edinburgh Post-Office stamp of 23d July, and the postage of 1s. 1d. on the back; and from these circumstances he verily believes, and has not the smallest doubt in his own mind that the said letter is the one that applies to the aforesaid entry in

the postage book, and was truly received by him of the above date, and either delivered to the said Johanna Dalrymple, if then in Edinburgh, or forwarded to her if at Braid, which postage book the witness has now exhibited and shewn to the Actuary, who finds therein the aforesaid entry of 23d July, 1805, in the account entitled "Miss Gordon of Cluny," and that it is the only entry of that date, and is correctly stated by the witness. And the witness further deposes and says, That he recollects perfectly well having been desired by the said Johanna Dalrymple several times in the course of the year 1806, to call for letters at the Post-Office, Edinburgh, to the address of "Nicholas Webb, Esq." who the Deponent thought at the time might be some friend of the family, or some person who had come to Scotland on a visit; That he did accordingly make enquiries at the Post-Office, and did there receive a letter having the above address which he immediately forwarded to the said Johanna Dalrymple, according to the orders he had received from her; and he remembers she was at that time living at her father's country seat at Braid House near Edinburgh; that he remembers the seal of the said letter had the words "Transport-Office" on it, and being shewn the letter, No. 17, of the Exhibits annexed to the aforesaid Allegation, dated the fourth of July, 1806, addressed "Nicholas Webb, Esq. Post-Office, till called for, Edinburgh, R. G." He deposes and says, that by the address and seal of the said letter he knows it to be the same that he received at the Post-Office, and forwarded to the said Johanna Dalrymple, as above deposed to; and further deposes, that the said Mrs. Johanna Dalrymple having gone to the north country about the month of October, 1806, the Deponent received a note or card from her dated at Kinsteary Lodge in Nairnshire, the 21st of that month, which he produces and is hereunto annexed, and in which she writes to the Deponent thus, "Miss Gordon hopes he will be very attentive in forwarding every note or letter that is left for her, as it will be the means of saving her much trouble," and again, "Mr. Roy will call in a few days at the Post-Office Edinburgh, and enquire if there is a letter for Nicho-

“ las Webb, Esq. and forward it instantly to Miss Gordon;” That this note or card was received by the Deponent in the said month of Oct. 1806, and is marked in his hand-writing on the back, in these words—“ Kinsteary, 21st October 1806. Miss Gordon about Mr. Mathison’s demand, Post-Office, &c.” and the same is also marked in the Deponent’s hand-writing, on the back thus, “ answered 1st November, P. Copie,” And the Deponent now produces copy of his answer to the aforesaid note or card, dated 1st November, 1806, in which he mentions that there was no letter at the Post-Office, according to the address he was desired to call for, but if one came the Deponent would forward it immediately; which copy answer is hereunto annexed, and the principal was wrote and forwarded to the said Johanna Dalrymple on the said 1st of November, 1806; And further deposes, that he recollects perfectly that in the course of the years 1805, 1806, 1807, the Deponent received and carried to the Post-Office several packets and letters from the said Mrs. Johanna Dalrymple, addressed to Sir Rupert George of the Transport Office, London, and several letters or packets addressed to Samuel Hawkins, Esq. sometimes at Chelsea College, London, and sometimes at Brighthelmstone or Brighton, all which letters so received by him were regularly put into the Post-Office; That these letters and packets were all addressed on the back in the hand-writing of the said Mrs. Johanna Dalrymple, with which hand-writing the Deponent was well acquainted, having frequently seen her write; That he also forwarded by post several letters received by him from the said Johanna Dalrymple, addressed to the Defendant John William Henry Dalrymple, Esq. during the years 1804, and 1805, and that he also received by post various letters which the Deponent understood and believed to be from him during these years, addressed to Miss Gordon, and which the Deponent delivered or forwarded to her accordingly, and charged the postage to her account, and further deposes that from the following entry in his postage book, now exhibited to and compared by the Actuary in these terms, “ 1807, October 30th. Post “ Brighton, 1s. 1d.” taken from the account of “ Miss Gor-

“don of Cluny,” he is satisfied, and believes in his conscience, that the Letter, No. 18, of the Exhibits, annexed to the aforesaid Allegation, dated 26th Oct. 1807, and addressed to Miss Gordon, was received by him the Deponent, on the said 30th of October at the Post-Office, and was forwarded by him to the said Mrs. Johanna Dalrymple; That he observes that the said letter was originally addressed thus, “Miss J. Gordon, Braid House, Edinburgh;” but she being at that time residing with her sister at Ballencrief, the Deponent deleted the words “Braid House, Edinburgh,” and substituted in their place the following words, “Sir J. Johnston’s, Bart. Ballencrief, Haddington,” which last mentioned words are of his hand-writing. That from an inspection of the back of the said letter, he is now satisfied he was in a mistake in the entry in his postage book, in stating the letter to be from “Brighton,” instead of “Ryegate,” which he now observes on the back of the letter, and the reason he assigns for the mistake is that the address of the said letter appeared to be in the same hand-writing with other letters which he had before received for the said Mrs. Johanna Dalrymple, with the Brighton post-mark on them; But he is perfectly satisfied that the said entry applies to the said letter, and the said letter after having altered the address as aforesaid, he forwarded by post to the said Mrs. Johanna Dalrymple, as before stated; And further or otherwise the Deponent cannot depose to the articles of the aforesaid Allegation.

JAMES ROY.

16th March, 1811.

Repeated and acknowledged at Edinburgh before me the undersigned
W. M. CALDER, Provost.

In the presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

Kinsteary Lodge, Oct. 21.

MISS GORDON

HAS never received one line from Mr. Laing on the subject of Mr. Mathison's business, which she is much displeased at. It will be very obliging to tell those people where she is, and beg of them to write to herself. Miss G. has never heard a word from the Lord Advocate or she would have informed Mr. Roy. She has not the least acquaintance of Lords Carysfort or Buckinghamshire, but will mention it to her brother John, who is to be here in a day or two. But Mr. Roy can mention this to himself by letter. Miss Gordon hopes he will be very attentive in forwarding every note or letter that is left for her, as it will be the means of saving her much trouble. Mr. Laing certainly had not told Mathison that Miss G. was not in Edinburgh, as he is a very civil man, and would not have been so impatient unless he had been provoked. Mr. Roy will call in a few days at the Post-Office, Edinburgh, and enquire if there is a letter for Nicholas Webb, Esq. and forward it instantly to Miss Gordon.

Edinburgh, 1 November, 1806.

MADAM,

I HAD the honour of your letter the 21st, a few days ago. Miss Mary sent it in from Mortonhall, where she has been for eight days past.

I waited upon Mr. Mathison who has agreed to wait till December; but he desired me to forward to you the enclosed account, and say they stood very much in need of money,

and if you could pay him sooner he hoped you would do it. I wish you would write him a few lines yourself. Mr. Laing told me he had wrote you about his demand some time ago, but surely his letter must have miscarried as you never received it. I shall not fail to forward any cards or letters given in here for you. There is no letter at the post-office according to the address you desired me to call for, but if one comes I shall forward it immediately. I am afraid the Lord Advocate has forgot to make the application about the post-office, otherwise he would have wrote you. I have been advised to put him in mind of me by a few lines, to learn if he has applied. I doubt the place I should have got is filled up, but there is another vacancy soon expected, and if I find he has not applied I shall then write to Mr. John, if he will apply to Lord Carysfort, and if he could again trouble his Lordship I might still be successful in getting the first vacancy. I remain respectfully, Madam, your very obedient humble servant.

On the ALLEGATION and EXHIBITS given on behalf
of Mrs. DALRYMPLE.

JOHN LAING, Clerk to Charles Gordon, Esq. of Cluny, residing in the city of Edinburgh, aged twenty-nine years, a witness produced and sworn, deposes and says, That he now is and has been clerk to the said Charles Gordon, Esq. father of Mrs. Johanna Dalrymple, the Party Promoter of this Cause since the year 1804 ; That he began to keep Mr. Gordon's cash transactions from about the beginning of June 1808, in consequence of Mr. James Roy having left Mr. Gordon's service at that time ; That from that time it has always been part of the Deponent's duty to call every day at the post-office for the letters addressed to Mr. Gordon and his

family, which he receives and delivers to the persons to whom they are addressed, and he charges their particular accounts with the postages. That the Deponent observes an entry in his postage-book of 1808, and charged against the said Mrs. Johanna Dalrymple, under the name of Miss Gordon, in these words, "1808, June 13, postage from Worthing 1s. 1d." which book he now exhibits to the Actuary to instruct the correctness of the said entry, and which the Actuary accordingly compared and found correct; That the said entry corresponds exactly with the date and post mark on the back of the letter, No. 20, of the Exhibits annexed to the aforesaid Allegation, and there is no other entry in the said Mrs. Johanna Dalrymple's account of postages in the said book during the month of June 1808, nor was she ever in the practice of paying the Deponent at the time for the letters he received and brought to her from the post-office as the postages were always stated to her account, and paid generally half yearly or thereabouts; That the Deponent does not recollect perfectly having received at the post-office, and delivered to the said Mrs. Johanna Dalrymple a letter corresponding to the said entry in the postage-book of date the said 13th June, 1808, as already deposed to, but he has not the smallest doubt from the circumstances above-mentioned, that the said letter, No. 20, of the Exhibits now shewn to him, is the same with that which he must have received and delivered, though he did not pay any particular attention to the appearance of the letter at the time, except to mark the postage and post-town from whence it came in his postage-book, as aforesaid. And further or otherwise the Deponent cannot depose to the articles of the aforesaid Allegation.

JOHN LAING.

16th March, 1811.

Repeated and acknowledged at Edinburgh before me the undersigned
WM. CALDER, Provost.

In presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

EXHIBITS annexed to and pleaded in the LIBEL
given on behalf of Mrs. DALRYMPLE.

No. 1.

(Endorsed) "A sacred promise."

I DO hereby promise to marry you as soon as
it is in my power, and never marry another.

J. DALRYMPLE.

& I promise the same.

J. GORDON.

No. 2.

I HEREBY declare that Johanna Gordon is
my lawful wife.

J. DALRYMPLE

May 28th, 1804.

AND I hereby acknowledge John Dalrymple
as my lawful husband.

J. GORDON.

No. 10.

I HEREBY declare Johanna Gordon to be my lawful wife, and as such I shall acknowledge her the moment I have it in my power.

J. W. DALRYMPLE.

July 11th, 1804, Edinbro'.

I HEREBY- promise' that nothing but the greatest necessity (necessity which situation alone can justify) shall ever force me to declare this marriage.

J. GORDON,
(now) J. DALRYMPLE.

July 11th, 1804.

Witness, Charlotte Gordon.

No 11.

“ Sacreed promises and engagements.”

“ J. D.”

“ J G.”

LETTERS annexed to and pleaded in the LIBEL
given on behalf of Mrs. DALRYMPLE.

No. 3.

MY DEAREST LOVE,

Dunbar, Friday Evening.

I AM waiting with impatience for the letters from Edinbro', as I expect a few lines from you, but to prevent all unnecessary disappointment I will commence mine, least it should not arrive in time to-morrow. I am quite alone in this horrible place, and till this moment I have been most melancholy at reflecting how few hours have elapsed since *my happiness was perfect*, blest with the society of one whom I adore, and for whose happiness I would sacrifice my life; but still Hope, which seldom deserts me, remains my friend, and whispers for my consolation "You are not forgotten." Sorry am I to find that my hopes of a letter are vain; but I trust that the omission proceeds more from fatigue than illness, as I am certain one or the other must be the cause, as I know how scrupulously you observe all promises; and when you reflect on my miserable situation, cut off from all the society I liked, and banished to a wretched town without one friend to speak to, you will I am sure increase rather than diminish those dear attentions you have so repeatedly shewn me: therefore I am selfish enough to desire you to write *two letters daily*, which must be put into the post by two o'clock, and they will arrive here at eight. If you write me one every night and another in the morning it would be easier for yourself. Pray forgive my impatience in asking such a request, as you know my motive. I will be in Edinbro' by 11 *at night* on Monday, so we may arrange every thing for the Tuesday's expedition. I think it would be better not

to send the curricule into town as it is too well known,† * * *

* * * * *
but as you please, you have but to order, I to obey. This most horrid place has made me so very melancholy that I fear my letter will bear some marks of it, but as I well know how anxious you are sometimes for letters, I was determined to attempt it. I shall only add that I trust all that has ever happened within our knowledge may be faithfully remembered by us, and that you will never change the opinion (you have so repeatedly assured me you have of me) indeed to doubt it would be the act of the greatest ingratitude on my part. *I insist on your ordering every thing you want, and drawing on me for whatever money you stand in need of as it is but your right, and in accepting of it you will prove your acknowledgment of it.* Let your dear picture be finished as soon as possible, as I shall be impatient for so beautiful a companion, though God knows but a poor apology for the reality. * * * * *

Give my love to my dear little *sister*, and the post only allows me time to say how truly how devotedly

I am,

Dear Wife,

Your sincere and faithful

J. D.

This Letter has the Ediuburgh Post-mark of May 27, 1804.

I passed Tranent but did not see Johnson. Send me a small seal with a proper inscription, as I have only a wafer seal which does not do: you may put it in a letter.

† The passages which are omitted relate entirely to other persons, and have no bearing on the present question.

(Addressed) "Miss Gordon, Saint Andrew's Square,
Edinburgh."

MY DEAREST SWEET WIFE,

Tuesday.

YOU are I dare say happy at Queen's Ferry, while your poor *husband* is in this most horrible place tired to death, *thinking only on what he felt last night for the height of human happiness was his*. To be near the woman we love is a sensation only to be conceived by those who have experienced what it is to be separated. God knows no one has ever felt it more severely than I have, as what hours has this cursed place lost me, hours which may never afford me the pleasure I have experienced, as fate appears determined to place us at a more remote distance. What am I to do when you are at Cluny? Heaven alone knows! It will be impossible for me to be with you; As to leaving you, the thought is distraction; think on some plan for me as I shall be truly miserable if you do not. *Have you forgiven me for what I attempted last night?* Believe me the thought of your cutting me has made me very unhappy. Pray do not, you cannot, you shall not, by the power of heaven I would rather see you dead than in another's arms. The idea is misery, my sweetest love, do, do forgive me; consider *you are my wife*, you are the only woman I ever cared for, and believe me my sentiments are not of that changeable disposition they would wish you to believe.—I am engaged, to retract is and ever shall be impossible. It was very lucky I left Edinbro' at the time I did, as I found my name down for a court martial; but thank heaven I was in most excellent time. I think I shall soon take another voyage—I think of asking Don for leave on Saturday, and of being with you at the *usual hour*; but I shall be able more fully to arrange it on Friday. Your dear sermon is arrived; it found me at dinner with * * *
* * * * *
which will I fear, delay this letter, but I hope most

sincerely it will arrive in time for my pretty dear. Send me a long account of the expedition, was * * there? Not that I doubt my love's fidelity, but still I wish to know even her most inmost thoughts; such is the doating fondness I have and ever shall have for her, she is my only life, and as long as breath remains will I protect and preserve her. Your letter was not quite so angry as I feared it would have been, but you will pardon it *although it was my right yet I make a determination not too often to exert it. What a night shall I pass without any of those heavenly comforts I so sweetly experienced yesterday.* Thank God, a time will soon come when all those vexations will be of no consequence. Having proved my *legal right to protect you which I have most fully established, and nothing in this earthly world ever can or shall break those ties which it will be ever my greatest happiness to reflect on.* The post allows me only to say that the dearest love is always in the thoughts of her doating husband.

J. D.

Mrs. Dalrymple.

Brotherly love to my Sister and R.

This Letter has the Edinburgh Post-mark of May 30, 1804.

 No. 5.

(Addressed) "Miss Gordon, 4, Saint Andrew's Square,
Edinburgh."

MY DEAREST LOVE,

Wednesday.

AS I dine out with the 18th, it will probably be late before I return, in which case I shall write to you this moment. I expect by this night's post a very long letter from pretty dear, giving me a long history of all that has happened since my departure. I am just returned from taking a drive, solitary enough, at least; how much I

thought of the difference between the one I took this day last week ! then I was as happy as possible : when I shall take another as pleasant I know not, but most sincerely wish for it. I intend leaving this on Saturday evening, and leaving the curricle at Haddington, with directions for its following me the next day, as I intend being present at the review on the 4th, where, of course, I shall have the pleasure of meeting with you ; On Saturday, therefore, we meet. The hurry I was in last night for your letter being in time, prevented my taking notice of one part of your dear little sermon, in which you seem to think my intentions are to retract from what I have said so repeatedly to you. Indeed, my love, this is not behaving right, and I insist on never finding it in your letter again, as I shall be seriously angry with you, and in turn shall lecture your want of confidence as you do my constancy ; believe me, I have not spoken to a woman since I saw you, indeed, excepting * * *

* * * * *

I am happy to hear that Lotta does not go till Saturday, as it will give *us a better opportunity if you are at Braid*. Give her *brother's* love in the kindest manner to his pretty little *sister* ; tell her I hope to see my friend become a happy man ere long, although I see many obstacles to that ever taking place. This will be a most horrible dull letter, but as your pretty epistle has not arrived I am quite at a loss for any thing to say, as repeating what sentiments I feel and ever shall entertain for you, would not, I fear, amuse you, as you entertain so many doubts of their ever being fulfilled ; forgive me saying this so often, but I am very ill-humoured at being alone so long, so the dearest of creatures will pardon me I am sure. I got your's, directed to Haddington. I found B. in his bed about eight in the morning, and took the letter from him : he was asleep, and I dare say, was not sensible of its loss. ***** will be here by the mail of this night, this will quiet your apprehensions of me, as I am certain he would not allow me were I inclined to be foolish. I hope the seal will soon come ; the ring has never quitted my finger, nor ever shall. I keep this letter open

till ten, in order to answer your's. Half past nine—no letter is arrived: Great God! what is the cause? Oh! Jacky, believe me, all the torments of hell are nothing compared with what I now experience, but remember *you are mine, and may this be the last word I ever write if I ever resign you to another*. I suppose ***** has made you forget the *bundle*, forget your sacred promises, but all heaven shall not tempt me to suffer you one moment in his company. I am distracted; I am truly wretched; I know not what I write. How can you use me so? *but on [torn†] you shall, you must become my wife*, as I will not trust you a moment out of my sight. Oh, my love! take pity on me, think on me; how doatingly fond I am of you; how I adore you; Why do you not write to me? Have I not punctually fulfilled every promise I ever made? Did I ever keep you without a letter? Did you not sacredly promise to write two letters daily for me, and have you fulfilled it? No, you have forgot me; and I am only sorry I have lived to see this day: better had it been for me if I had died, or any thing but this. I could sooner have suffered any pain, any torment; but write to me by return of post, tell me only that you love me, then I shall be happy. Oh, my love! what can be greater torment than disappointment in such a case as this? I have been mad, miserably so. I know not what I have written, as I am crying so that I can hardly see the paper. I hope you will forgive me, and pardon all I have ever offended you in, as I cannot recollect any part of my conduct which deserves so harsh a treatment; think on me, pray do, and write me your forgiveness, as I am truly unhappy if you do not. I must at all hazards come to you; better would it be for me to become an outcast of society than experience what I now do. Pray write by return of post, and say you forgive me, is all I ask, although I am ignorant how I offended you. *That God Almighty may bless and preserve my wife is the prayer of her husband.*

J. D.

† On Sunday, on my soul.

No. 6.

(Addressed) " Miss Gordon, 4, Saint Andrew's Square,
Edinburgh."

MY DEAREST SWEET LOVE,

Thursday.

A THOUSAND times do I thank you for your pardoning me, as till the post arrived I was most unhappy at thinking my only love and delight was seriously angry with me, this would certainly render me eternally miserable, as I could bear any thing but her anger and disdain. Your disappointment was certainly a most severe trial, one which I little deserved, as I wrote to you on Tuesday night, and even shortened what I had to say on purpose that it should be in time; how you did not receive it I am at a loss to imagine, but suppose it was owing to some mistake in the post, which you know I cannot possibly prevent, as I write every night of my life to you, and if you do not receive a letter be certain it is not my fault.

* * * * *
* * I shall pay them a visit to-morrow, as nothing but the business of this horrid day would have prevented my going, thinking that she would be there, as I wished to enquire what was the matter with you, fearing a thousand things might have happened, but as it is lucky, I did not go, your letter has afforded me real comfort as it proves how noble a soul you possess, believe me, I should conceive myself most criminal did I, after what has passed, think of being off; believe me, you need not entertain any apprehensions on that point, as I am too deeply attached to you for any thing to change; although I do lecture you on your doubting my constancy, yet I still am pleased at it, as I

consider it as a proof of your affection. * * * *

* * * *

I called on * * * he rallied me about *you*, and said that if you were at North Berwick it would not be in the power of the worst of days to detain me here ; he inquired after my little *sister*, and said she was a dear little creature ; *little did he think what a relationship subsisted between us.* He invited me to dine there to-morrow, but if possible I will be off, as I think it will be impossible for me to be from North Berwick in time. On Saturday night, dearest of dears, we meet : happy will it be for me as I am quite dead without you ; the time will come, I hope, when that separation shall be no more, as it grieves me even to suffer you five minutes from your *husband*, although most fully most completely convinced of your unalterable attachment. On my part I can only say, that nothing can change my sentiments of you, they are too firmly rooted to be destroyed, independent even of those *sacred ties which unite us, my love*, for you would still be the same ; *as it is now sealed*, it would be most villainous in me to alter one sentiment I ever professed. 'This will, I sincerely hope, convince you how sorry I am that the neglect of a letter should have made you so angry, but I desire you to inform me if you received mine of Tuesday night, that I may inquire into its loss if it did not arrive. Once more then I most solemnly request you will not allow one thought injurious to the fulfilment of all the promises and engagements I am under to you, as nothing *can* or ever should, if possible, annul them ; read this over and over, and put that confidence in me which your peace of mind, your *duty*, in short, every thing ought to be dear to you requires, as it will be the most certain way to make yourself miserable for ever, as this kind of suspicion will finally end in your being jealous if I speak to another woman. Forgive this lecture, my love, as it is the only thing I can find in you to lecture. I will let you know whatever passes to-morrow at B. ; I should not go there did I not think it would appear remarkable

after the acquaintance I have with both parties. Lotta will be too much engaged to flirt with me if I was in spirits, which is far from being the case. When is the seal to be finished? and I am all impatience in that as well as every other thing. *Put off the journey to Braid, if possible, till next week, as the town suits so much better for all parties. I must consult L. on that point to-morrow, as I well know how apropos plans come into her pretty head; there appears to be only one difficulty, which is where to meet, as there is but one room, but we must obviate that if possible.* I intend asking leave in August for a month, and shall bend my course North, as I wish to fix my quarters in Aberdeen for a month at least, as we could often meet there and at ***** castle. Write to me immediately on the receipt of this letter, and say you forgive me, and that you never will again disappoint me, and I shall then be really happy. Pray where is the virgin, you never mention her: what brought her to my mind heaven alone knows. That God Almighty may ever preserve my wife, and inspire her with the purest love for her husband, is the first and sole wish of her adoring

J. D.

(The full signature obliterated.)

 No. 7.

(Addressed) "Miss Gordon, Braid, Edinburgh."

Tuesday, half past nine.

MY DEAREST LOVE,

CURSE on my fate, that although not wanted it should ever enter my head to come here, it is too late to attempt returning, but I will be with you *at eleven to-*

morrow night. Meet me as usual ; your letter has grievously vexed me ; how could you write me such a one. Believe me, in the greatest haste,

Believe me,
Your affectionate husband,

J. D.

P. S. Arrange every thing with L. about *the other room.*

No. 8.

(Addressed) " Miss Gordon, Braid, Edinburgh."

MY DEAREST LOVE,

Thursday.

I HAVE only time to say that I have yours, but there is only half an hour to answer it. I have received several letters from town, all of which say that Lord Stair has heard the report of *our marriage*. Good God ! how hard is my fate, that for the malice of a set of people I should run the hazard of being disinherited, therefore *contradict it in every company*, as my sole hope depends on him, and such a report would infallibly ruin me, which I know would hurt you, as I know you love me. I should not have mentioned this had it not been absolutely necessary for me to inform you of it; tell me if it is possible to see you now your brother has arrived, as it may be running too great risks : I shall be happy to be introduced to him. You I hope received my letters safe. * * * *

* * * * * My father wishes me to exchange into the Foot Guards, but I shall give no decisive answer ; his aversion consists in my being sent to Ireland

next year, when that time arrives I will first apply for a recruiting party, then, if refused, exchange into the Guards, certain of one from them, which will detain me in Edinbro' as long as the war lasts. I hope soon to be able to see you at Braid, when I shall receive dear Lotta's pardon from her own mouth, as she knows I am very fond of her. *I have spread the report of our not being married far and near.* Would to God there was a punishment for people maliciously trying to annoy others, as we have not been exempt from our torments.

* * * * *

Believe me,
unalterably your's,

J. D.

A most extraordinary circumstance alarmed us this morning, but the post only waits, so adieu.

No. 9.

(Addressed) "Miss Gordon, St. Andrew's Square."

MY DEAREST AND ONLY LOVE,

YOUR letter has made me truly miserable; I have only read half of it, as I am all impatience to assure you how unhappy the thought of neglecting you has made me. Nothing but the most absolute necessity of drills and every other species of annoyance could have made me neglect it this day, but till five o'clock I was not at leisure a moment. Would to God I could come to town, but it is absolutely impossible this night. I will write three sheets of paper to you this night. At present this must be

the only letter I have time to write. Well knowing the anxiety you must feel, and the danger of *the servant's being seen*. That God Almighty may eternally protect you is the only wish of your devoted *hus*—.

J. D.

No. 12.

(Addressed) “Miss Gordon, Braid, Edinburgh.”

MY DEAREST WIFE,

Halifax, July 25th.

FOR the last time I write unless you immediately write me an explanation of the cause of your being so long silent. I cannot suppose my letters have not reached you, as I never yet found the post deceiving me; but to think that any one should have already supplanted me in your affection is too melancholy for me to support. I have been now absent ten days, during which time you have not written one word in reply to the letters I constantly sent you. If my letters are disagreeable to you why not tell me so? for it must be inferred from no notice ever being taken of them that is the case, but although you are so negligent of your promises it shall never be said that in any one instance I departed from mine, considering them to be more strictly observed on account of the distance which separates us, but to save trouble, if I do not hear from you to-morrow I will write to my *sister*, and desire to know what is the reason of this silence, and I am certain she will not suffer me to be kept in the perfect state of ignorance of what is passing with you. Believe me, that the pain that writing to you in this manner gives me is greater than I ever yet experienced, but I freely forgive you, as, indeed, I could any thing you ever did to me, only trusting that, at some future

period you may think me worthy of being restored to that place I once possessed in your esteem, and to lose which would be worse than death. I shall leave this for York to-morrow, where I remain till Sunday, possibly later; direct to me there, but you shall hear from me ere that takes place, as I shall not leave off writing till we meet. I think of visiting Aberdeen after the 24th of August, where we can meet, for I am determined to see you, cost what it will:

* * * * *

Whatever money you want draw on me without scruple, as I am certain you must be in want of it. Pray write to me if it is but your name; and, dearest life, believe me,

Most devotedly

Your

D.

P. S. Send me your *picture* as soon as possible.

No. 13.

(Addressed) "Miss Gordon, 4, Saint Andrew Square,
Edinburgh."

MY DEAREST LOVE,

Chelsea, May 29th, 1805.

YOUR anger on account of my negligence is perfectly correct. I have behaved rather ill, therefore as I am fully sensible of my misdeeds, the least you can do is to extend your forgiveness. I do not wonder at your feeling hurt at it, but I hope no slight occasion will induce you to do any thing desperate, as it will prove a source of bitter regret to you afterwards. Living here I think naturally makes a man idle, but I assure you, you may depend upon my never changing any part of my conduct by separation.

I have spoke on the whole affair to a very particular friend of my father's, at this time residing with him, who has assured me that he will do every thing in his power to assist both of us, but that he would advise me to wait the course of time with him, as he says he is certain he would immediately convey his fortune over in trust to somebody, were I, as things are at present, to hint at such a transaction as *marriage*; therefore I am inclined to follow his advice, particularly as situated as you are, *nothing could strengthen the ties which unite us*, and as the fortune I possess in my own right is so small and so much impaired that it would be nearly impossible for me to support you in the style of life you ought, as my wife, to be supported in; therefore it is my wish it *should not be mentioned* till such time as it can without injury to ourselves be done. At the same time, *I must insist on a paper properly signed by you, acknowledging yourself my wife, being sent me as soon as possible, as, in case of my death, it would be necessary for you to produce it, to enable you to take possession of what I may leave behind.* I did not intend this as a melancholy epistle but as essentially necessary to both our interests, therefore look upon it as such, and as you obey me, or I you, we shall be as happy as otherwise we should be miserable.

* * * * *

Write to me as soon as you can, and never, my love, be annoyed at not hearing from me, as you may depend upon my ever holding your interest in my mind, and as there is nothing I would not sacrifice for your good, so am I certain there is nothing you would consider too much to be done for me, well knowing your genuine goodness of heart and disposition. I met Captain J. again, which is very disagreeable, as considering his relationship it makes it very unpleasant, and I wish particularly to be reconciled with both of them were it possible, but as you know the temper of the one, I am very apprehensive it is not likely to take place, only you have my free permission to act as you please, and to tell Charlotte that I wish her every comfort, and only regret my cursed folly in ever mentioning a subject likely to

disturb the harmony of her house.

* * * * *

I am so much hurried by the General, who is waiting for me, that I have only time to say I ever am, dearest love, most affect. your's.

J. D.

Many thanks for the picture, which arrived safe.

No. 14.

(Addressed) "Miss Gordon, 4, St. Andrew's Square,
Edinburgh."

MY DEAREST WIFE.

Chelsea College, June 10, 1805.

I AM greatly surprised at your having so long declined writing; and not knowing to what cause it is owing am inclined to attribute it to nothing very favourable to myself. If you have cause of complaint against me why not at once my love tell me so, and not drive me to distraction by abstaining a fortnight without ever writing one line. I am unwilling to attribute it to a change in your affection, well knowing how much you may be trusted; but if I do not very soon hear from you I shall not be perfectly easy on that head. If you are angry with me for going abroad I will allow you to have just cause; but when you consider the utter impossibility of my existing in this country as a gentleman, on account of the mean conduct of those who ought to be the first to support me, you will I hope allow there is more ground than caprice for this sudden movement. In the next place I solemnly assure you that *I will not be absent from you very long*, and that as soon as my affairs are put into any order and arrangement my return will be certain. Situated as I am is to me misery to exist, tired out of my life at home and eternally quarrelling with those I am living with, renders it to my mind nothing less than a very accurate specimen of

what may be expected hereafter ; but having these things constantly tormenting me, *will you allow me to endeavour by a short absence to rectify them ?* You know how little in point of use my stay would signify for these next four months, and with my turn for expence how very liable I am to involve myself ten times deeper than ever. *If in thus asking your consent* to what, although you may allow, you do not approve, I most humbly, dearest love, most solemnly conjure you to pardon me, and to repeat the assurance how deeply those attractions which were the first cause of our acquaintance remain fixed in my breast ; and in whatever part of the world chance may throw me, they will afford me the consolation and hope of in a little time proving my regard to the whole world ; an event, evidently I think at no great distance, will at once render *me independent and you equally so ;* for while the obstacles and plagues which now torment me exist, neither you or myself can ever know either ease or happiness. You will I hope grant me your pardon for thus tormenting you with what I fear must evidently appear to you as a dull repetition of the same sentiments constantly made use of, but I solemnly assure you that they are the natural feelings of one who, though in every action of his life has hitherto been most unfortunate, yet has no wish to conceal them from you. To return to a more gay and proper subject for a letter. I am most happy that Charlotte has now arrived at the zenith of power, and is surrounded by every wish she can form ; most sincerely do I congratulate her—and although an idle moment put a slight check to our former acquaintance, yet I hope that on my return to this town next year, it may appear to her as the failing of human nature, and in a general confession to atone for the crime, may be productive of a renewal of our former friendship, as nothing could give me greater satisfaction than once more to be considered, as I believe I may be allowed, her *brother*. The people here say that old Pulteney never made a will. If she is the gainer by it, I hope so most sincerely. I supped the other night with a M. ****, who was a good deal in Edinburgh last winter. He said he knew you perfectly, and told me a great many anecdotes about you,

which could not but be gratifying to me, as I find that the idle *bundle* is not so much forgotten as some people would have me believe. * * * *

When I leave this capital is I believe most uncertain. The ship I am going in is nearly ready ; but no person can possibly say when she will be : and as to her sailing I think it will not be for some time yet. Situated therefore as I am, pray my only love do write to me by return of post, and if you have any regard, or the least remains of the attachment you once had and professed, do write constantly to me, and at the same time forward *the paper I requested of you in my last letter, and acknowledge yourself my wife, that as we are not immortal I may leave you in trust of a friend of the greatest honour, the small remains of what once was a tolerable fortune.* Did I not consider this as most essentially necessary for both our interests, on my honour I would not request it ; but as *you cannot refuse on any legal grounds, do my dearest wife forward it directly,* and let your pardon for all the uneasiness I have given you accompany it, or otherwise I shall be perfectly miserable ; and I most solemnly promise that there is nothing on earth that you may request that I will not do except remaining here, which situated as I am would render it perfectly unsafe in me to comply with, as nothing but my departure can restore my fortune to what it once was, or cause the liquidation of those debts which have hitherto so long plagued and perplexed me. Having thus explained to you the whole cause of my departure, I am inclined from your goodness of heart, setting aside all other considerations or claims, to hope that the return of the post will bring back a perfect free and uncontracted pardon for past, for all sins committed, but particularly as they were not caused by myself, but the villainy and malice of others. I shall now conclude with every wish this world can bestow may be your's, and that I ever am,

Dear Jacky,
most devotedly
your husband,
D.

(Addressed) "Miss. Gordon, Braid, near Edinburgh."

No. 15.

MY DEAREST LOVE.

Chelsea, June 28th, 1805.

I RETURN you a thousand thanks for your kind remembrance of so idle a being as myself. I allow it is more than I merit, but I have endeavoured to do something in return for it. I have called on Lotta and Johnstone this day; they were out of town, but as soon as they return I will certainly call again and write her a letter expressing my sorrow for the disagreement, and hoping to be again considered as her *brother*, a title I would not give up for any consideration, and when I return *our families* I trust will be on the footing they ought to be. But you must allow that he ought to have first spoke to me, as I could not consistently with etiquette make the first advances: although stifling all other feelings to the desire of reconciliation, I have in this instance been the first. I with this send you the hair so long wanted, and which you ought ere this to have received. It was by mistake sent to Colonel Dalrymple, where it was likely to remain, had I not luckily arrived in town. If it does not please you, write to Wirgman St. James Street, he will alter it, and has my directions to forward to you any thing you may write to him for, so do not out of false notions of economy deny yourself what you require, as I should not wish *my wife* on any account to appear in any thing not perfectly consistent with her rank. The Duchess is still in London. If I remain here till Sunday Sir Willoughby Aston has promised to introduce me to her notice.

* * * * *

I am going this evening to a masquerade, and afterwards to Mrs. Hamilton's, our relation: Lady H. Dalrymple is to be there, and I expect of course a great deal of railery, not having seen her since the confession she made me make at Dunbar relative to certain affairs in which *you* were greatly con-

cerned, but by which I fear her Ladyship did not greatly improve her stock of knowledge on the subject. * *

* * * * *

I arrived here very late on Tuesday from Suffolk, and now find I might as well have remained where I was, but I confess the country is to me so horribly dull that I find time too heavy on my hands to admit of a long stay there. I want to go north, but in the state of uncertainty relative to my going abroad I do not think it adviseable to leave this place. To say the truth I begin to wish I had not [torn] to the proposal, but as my relinquishing it now would only gratify certain people whom I equally detest and despise, I am rather inclined to proceed. But of my departure you shall have ample notice. Will you send me a lock of your beautiful hair, as I intend having it set in a new form, particularly as the only lock I have at present is too small to convey to me the remembrance I wish. There is one thing my love which annoys me, I mean the reflection of not having behaved *to you so liberally* as I ought to have done; but I hope you will pardon me, and in return *you have my free permission from the 16th of November to make whatsoever expence you please, as I will before my departure arrange all money matters in such a manner as to give you every opportunity of gratifying your taste or any other fancy you may take into your head.* I hope that virgin sister of mine is likely to change that odious appellation. You should introduce some captain to her that she might at least be on equal footing with yourselves. * * * * *

* * * * *

* * * * *

* * * * *

God bless you my dearest Love,
ever affectionate *Husband*,

D.

EXHIBITS annexed to and pleaded in the ALLEGATION given on behalf of Mr. DALRYMPLE.

A.

Ballencrief House by Had.
19th Nov. 1807.

SIR,

AS I find by means of the correspondence I have had the honour of having with you, that the footing on which I stand with Mr. Dalrymple has transpired, and through the Duchess of Gordon, it has come to both my brothers' ears. In this case I shall have no hesitation in putting my papers into the hands of a man of business, and establishing my rights, as it is a very unpleasant thing to hear different reports every day. The last one is, that Mr. Dalrymple had ordered a new carriage on his marriage with a nobleman's daughter, and that his and her arms were actually quartered on the carriage. All these various reports came from the Duchess of Gordon, and she says, from what she learnt through you, from a friend of your's, that I have Mr. D. completely in my power; that I can either make him acknowledge me publicly as his wife, or make him pay a very large sum of money. The latter of which I shall certainly not do. I do not want money, I want justice; and as I am used extremely ill by him I shall shew the world who has been to blame. If you, Sir, with your usual goodness of heart, did let him know my determination in this business, and that I am to have the support of my brothers in the case, and unless he comes forward and says he means to behave like a gentleman, and as he ought to do, I will make him. A maintenance he is obliged to allow me, whether he lives with me or not; few would have borne this

treatment so long, and if the secret had not been divulged through you, I do not believe I would have divulged it, for fear of involving others ; but, on the whole, I believe I am obliged to you. I have the honour to remain,

Your very obedient humble servant,

J. GORDON.

(Addressed)

“ Samuel Hawkins, Esq.

“ Grand Parade,

“ Brighthelmstone.”

B.

Edinburgh, May 9th, 1808.

(Private.)

SIR,

YOUR former goodness to me induces me to again trouble you with a few lines, to see if you would have the goodness to let me know if there has been any accounts lately from Mr. Dalrymple. My unhappy situation is the only apology I can offer for the uncommon trouble I have offered you, and which your humanity has paid attention to; any real friend of Mr. Dalrymple's ought to caution him against forming any new engagement, as though I have not brought forward my claims at this time for particular reasons, that is not to say I have relinquished them. That I am determined I never will do, and were he to think of forming any of the connexions that have been talked of, or any connexion whatever, I will immediately come

forward with my claims, which must put himself and the unfortunate woman in a most disagreeable situation. My idea is, that he is not aware how binding his engagements are with me, and though this says little for his honor, some friend ought to warn him of his situation. () I am convinced he will force me to strong measures ere long. Pray excuse my troubling you, but my sufferings must plead my apology. I know not what comfort is since this cruel business.

I have the honour to remain,
Your very much obliged,
humble servant,

(Addressed)

“Samuel Hawkins, Esq.
“Findon,
“near Shoreham,
“Sussex.”

C.

EXTRACTED from the Register Book of Marriages belonging to the Parish of St. Mary-le-bone, in the County of Middlesex.

The year 1808.

Page 494, No. 1480.

JOHN DALRYMPLE, Esq. of the Parish of St. George, Hanover Square, in the County of Middlesex, Bachelor, and Laura Manners, of this Parish, Spinster, were married in this Church, by Licence, this second day

of June, in the year One Thousand Eight Hundred and Eight, by me,

BENJAMIN LAWRENCE, Curate.

This marriage was solemnized between us,

J. W. H. DALRYMPLE,
LAURA MANNERS.

In presence of

G. ROBINSON,
R. T. NORTH,
CHARLES P. MORGAN.

The above is a true copy of the entry of marriage from the Register Book of Marriages belonging to the parish of Saint Mary-le-bone, in the county of Middlesex, the same having been carefully copied therefrom and faithfully collated therewith, this fourth day of November, in the year of our Lord One Thousand Eight Hundred and Nine,

By me,

W. B. CHADWICK.

Letters annexed to, and pleaded in the ALLEGATION given on behalf of Mrs. DALRYMPLE.

No. 16.

(Addressed) "Miss Gordon, Braid, near Edinburgh."

MY DEAREST LOVE,

Portsmouth, July 19, 1805.

I HAVE been so hurried on my departure for this place that I have been literally travelling for this fortnight, but at last am stationary at this most *delectable* place. As yet no convoy is or for some days likely to be appointed; and as I dread the thoughts of remaining at so horrible and dirty a place, I think it very likely that I shall return to the centre of all gaiety, London, till necessity obliges my departure. I at present feel by no means inclined for a Mediterranean trip, and could I by any means in the world contrive to be off I should certainly make use of them. As things are at present I purpose returning here in January or sooner if possible; but as all arrangements of this nature must be liable to so many changes, I do not fix any precise time for my return, as you may depend on my taking the very first opportunity of leaving a country which I by no means approve of, and which nothing but a foolish pique induced me to volunteer for; To add to all my misfortunes, just three days before I left London, I was introduced to the Dutchess of St. Alban's. * * * *

* * * * My father was suddenly taken ill after dinner on Monday, and they were at first very apprehensive something serious might have happened; but however he has rallied again, and they say better than before. He left this place the next morning for Chelsea. I would recommend you to enclose all my letters in a packet, to be forwarded to me through the care of

Sir Rupert George, the Transport-Office, London, who has more frequent opportunities of forwarding them than any other person. By the bye it is very extraordinary that I have not received one line from you for this fortnight past, which I attribute to the letters being missent, as there have been several letters written from London to me which I have never received. I wish you would before I go acquaint me where your brother is likely to be found, as I particularly wish to meet him. What sort of a disposition is he of, that I may be able to understand how to manage him in regard to yourself?

* * * * *

London is now nearly over, the place is becoming quite deserted: indeed I am not sorry for it, as no one ever left a place with more reluctance than I did town; and in exchange have got into a vile beastly place, and on the high road to a worse. I fear long enough before this reaches you I shall have taken my departure; but before that event takes place I must assure you that it is my fixed determination that nothing in the common course of things shall detain me there beyond the time first specified; and as that is so short I think we can only look forward to it; *there is one thing which I particularly wish to caution you about, which is never to give any belief to a variety of reports which may be circulated relative to me during my absence. If you do you will render yourself eternally miserable, and produce a breach between us which nothing in this world ever can rectify. I shall not explain to what I am alluding, but I know things have been said, and the moment I am gone will be repeated, which have no foundation whatever, and are meant only for the ruin of both. Once more therefore I entreat you, if you value your peace or happiness, believe no report about me whatever, unless you know it to be true.* This advice you will thank me one day or other for—at present it may appear harsh and ill-judged, but time will prove to you how justly I have foretold what will happen. I am sorry I did not see Charlotte before I left London, but in fact I was so very much hurried with the preparations and other troubles, that when

they returned I had no time to see them. A thousand thanks for the hair. I have it most beautifully set, and shall keep it as a memorial of pleasures past, but which will I hope soon return. *Why do you not write to Allen and order another riding habit? He has my directions to make whatever you think proper to order; so it is your own fault if you ever want any thing*—and when I am in Italy, if there is any thing you may particularly fancy, it shall be sent you. How is your father in health? in temper I should think nothing extraordinary.

God bless you, ever dearest Love,
Your's,

J. D.

No. 17.

(Addressed) "Nicholas Webb, Esq. Post-Office, till called for, Edinburgh."

R. G.

SIR, Transport-Office, London, 4th July, 1806.

I HAVE the honour to inform you that every letter sent to me to be forwarded to Lieut. Dalrymple, has been sent by the first opportunity after I received it. The 35th Regiment is either at Malta or Sicily; but I have no means of ascertaining which. If you will send me any letters I will forward them to our agent at Malta for delivery to him. I conclude that Mr. Dalrymple is not in England from his not calling upon me.

I have the honour to be,

Sir,

Your very obedient Servant,
RUPERT GEORGE.

No. 18.

(Addressed) "Miss J. Gordon, Sir J. Johnstone's, Bart.
Ballencrief, Hadding."

Grand Parade, Brighthelmstone,
26th Oct. 1807.

MADAM,

VERY unexpectedly until within these few days only, since I did myself the honour of addressing you from Mr. Coutts's Banking House, have I continued away from this place, so that the contents of your several letters were entirely unknown to me until my return, and under circumstances apparently so disadvantageous as I appear to have been placed in one of them, as also indeed to have relieved you from a considerable degree of anxiety on your own account, I should not have deferred so long satisfying you in your different enquiries; and reserving all explanations as to myself, I shall begin first with assurances to you that nothing really can have been more groundless than the extraordinary report circulated in your part of Mr. Dalrymple being either previously to or since the time of your enquiring of me, being in London, or even one thousand miles of it, having continued at Vienna, from which place I have received frequent accounts from him, and the last (making allowances for the great difficulty of communication) of recent date; so far too from its being at all in his contemplation even to return to this country, that he speaks decidedly of its being his intention to remain abroad for two years, and appears to have a strong inclination to extend his present quarters to a very considerable distance; having disposed I should hope entirely to your satisfaction of the groundlessness of that part of the report, it must be wholly needless to enter at all into the remainder of it, unless it may be to observe

that from the same quarter, in which a freedom of speech appears to have been made use of to my own prejudice, may have originated that, which certainly with no foundation at all, in the instance you allude to at least, can be ascribed to Mr. Dalrymple. Now with regard to any disclosure on my part of the correspondence which I have had the honour of holding with yourself, I beg you to rest assured that I have been particularly guarded; but when a young and impetuously minded character should on the first and only interview I ever had with him, have declared it to be his fixed determination hand over head, and with the utmost violence to proceed against one for whom you had expressed that affection so natural in a near connection, it was at least I thought necessary to let him be informed that I have been in correspondence with yourself on the subject, and that such circumstances had come to my knowledge as would I was sure preclude him from taking any such course as he proposed. I however never produced one single letter of your's.

I have the honour to remain,

MADAM,

Your most obedient

humble Servant,

SAMUEL HAWKINS.

No. 19.

(Addressed) "Miss J. Gordon, Ballencrief House, Haddington." N. B.

Grand Parade, Brighthelmstone,
11th Dec. 1807.

MADAM,

WHEN I did myself the honour of last addressing you, although dated I believe as above, it was in a great hurry at an inn on the road just as I was changing horses, and in my way on a very long journey into Wales, from which part I only returned this day, or I should certainly sooner have acknowledged your letters from Ballencrief House, and which I very much wish I was able to do more to your satisfaction ; but the present most extraordinary situation of this country, with all parts of the Continent, has effectually indeed cut off every sort of intercourse. I am wholly at a loss in what way to forward a letter to Mr. Dalrymple, and he must be so much so himself, I apprehend, that I have no expectation now of hearing until matters take a more favourable turn. The last letter I received from him was dated from Vienna, and it is now upwards of three months since ; at that time any breach between the Austrians and this country was not in the least foreseen by any of the English residing at Vienna ; but the Austrian Minister having yesterday, I was informed, required his passports, the English will be without any place of refuge whatever, unless they should be able by any means to get into Switzerland. There is too much reason therefore to conclude

that even those English at Vienna will share the same fate with their other countrymen on the Continent.

In Mr. Dalrymple's different letters, and particularly the last of them, I am given to understand by him that in place of two years, the first time limited for his stay, he should not think of quitting the continent at all; being heartily disgusted as he observed to me with England and its society. If any thing should by chance take me into the North, I should in that event do myself the honour of seeing you, when I might probably be more unreserved than I am in writing. At any rate I feel that I should have very little difficulty in satisfying you of my having acted throughout in such a manner as could not fail meeting as much with your own approbation as it would, I am convinced, that of Mr. Dalrymple. It is best for me not to mention the name of the person I alluded to in my last, but I have the satisfaction to think that by my timely explanation, and that only too in a general manner, much mischief was in all probability prevented; I could most easily defend the part I took to the Dutchess of Gordon, or to any of your own family, and most seriously wishing that I could prove much more useful to yourself or Mr. Dalrymple,

Have the honour to be,

MADAM,

Your most obedient

humble servant,

SAMUEL HAWKINS.

No. 20.

(Addressed) "Miss Gordon, Braid House, near Edinburgh."

Findon, near Shoreham, 7th June, 1808.

MADAM,

JUST at the moment that I ascertained, as I thought, Mr. Dalrymple's being at Palermo, and was actually writing to him at that place, having had a promise of my letters being forwarded from the Commander in Chief's Office, who, to my no small surprize, should make his appearance here but Mr. D. himself? He left Palermo, he informed me, only six and twenty days previously to his going down to me at Brighthelmstone, and finding that I had left that place, came over immediately to me at my new residence at Findon. Great, however, as my surprize was at seeing him, it hath been very much exceeded indeed by my having received letters from two very particular friends of his late father, informing me that on the very day after his return from hence to town he was married to Miss Manners. It being, as I have already intimated to you, known to some of his friends, that Mr. Dalrymple had, so recently to his marriage with Miss Manners, been with myself, it was not all together unnatural I felt, (ill-founded as such a conjecture certainly was) that it should strike them I might not only be privy to, but even the adviser of such a measure as was immediately afterwards taken; and therefore to do away the slightest surmise of the kind, I felt it incumbent on me to make assurances to them, as I also do to yourself, that neither in thought, word, or deed, have I at all participated in it, but on the contrary I believe my advice and opinion

were considered (to use his own term) much too gloomy, and were the means, I dare say, of completely deterring him from confiding one syllable of his intentions in my breast.

I have the honour to be,

Madam,

Your most obedient

humble servant,

SAMUEL HAWKINS.

Extract from the personal Answers on oath of JOHN
WILLIAM HENRY DALRYMPLE, Esq.

THE Respondent positively saith, that the only time when any connection by carnal copulation took place between them was on a night in the aforesaid month of May, at the house of the said Charles Gordon, Esq. at Edinburgh, prior to the signature by the Respondent of the Paper, marked No. 1.

Extract from the personal Answers on oath of
MISS JOHANNA GORDON.

THE Respondent further answering, says, that she denies that no carnal copulation did ever take place between the said John William Henry Dalrymple and the Respondent at any time subsequent to the signing of the said marriage contracts articulate, or either of them, or that the said

John William Henry Dalrymple and the Respondent did not in pursuance and upon the faith of the said marriage contracts articulate, or either of them, cohabit together as lawful husband and wife, or ever own or acknowledge each other as and for lawful husband and wife, for the Respondent saith, that subsequently to the written acknowledgment of marriage bearing date the 28th of May, 1804, they, the said John William Henry Dalrymple and the Respondent, upon the faith of their said marriage, consummated the same, and several times afterwards had the carnal use and knowledge of each others bodies, as well at the house of the Respondent's father in Edinburgh, as at his country-seat at Braid.

FINIS.



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London, Eng. (Diocese).
Consistory Court

A report of the judgment
delivered in the Consistorial
Court of London on the six-
teenth Day of July, 1811

